

# Private Development and Public Infrastructure

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OLO Report 2018-11

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## Executive Summary

Building new neighborhoods and new commercial buildings typically brings additional people to an area and increases the demand on roads, schools, and demand for public safety services and recreation options. Historically, state or local governments have been responsible for financing and building roads, schools, and community centers and for hiring police and firefighters. At some point, governments began to require developers to help finance the cost of public amenities that are strained by new development – as a condition of receiving approval to build.

This Office of Legislative Oversight (OLO) report responds to the Council’s interest in understanding the types of public infrastructure that private developers are required to build or fund in a development project in Montgomery County and other local jurisdictions. The report examines requirements in Montgomery County, Prince George’s County (Maryland), Fairfax County (Virginia), and the District of Columbia related to:

- Development impact taxes,
- Transportation infrastructure,
- Schools,
- Public water and sewer infrastructure, and
- Affordable housing.

This report does not and cannot answer the question of “where does it cost more to build?” Development costs include costs not examined in this report – such as regulatory costs, conducting environmental studies, and development application fees.

The table below indicates the types of infrastructure that developers are required to build or pay for as a condition of building in a jurisdiction.

### Requirements to Build or Pay for Infrastructure to Support New Development

|                 | Pay Money                    | Building Infrastructure |         |             |                    |
|-----------------|------------------------------|-------------------------|---------|-------------|--------------------|
|                 |                              | Transportation          | Schools | Water/Sewer | Affordable Housing |
| Montgomery      | ✓ Schools and Transportation | ✓                       | --      | ✓           | ✓                  |
| Prince George’s | ✓ Schools and Public Safety  | ✓                       | --      | ✓           | --                 |
| Fairfax         | ✓ Schools                    | ✓                       | --      | ✓           | ✓                  |
| District        | --                           | ✓                       | --      | ✓           | ✓                  |

**Development Impact Taxes.** Development impact taxes (or fees or surcharges) are taxes on new development where the revenue is used to pay for infrastructure made necessary by new development. Only Montgomery County and Prince George’s County have development impact taxes/surcharges.

**Transportation Infrastructure.** All jurisdictions in this report require developers to construct transportation-related infrastructures – including roads, mass transit, bicycle transportation, and pedestrian travel – to mitigate impacts to the transportation system due to new development. Most developers in Montgomery County also pay transportation impact taxes.

**Public Schools.** The four jurisdictions differ in how they require developers to contribute to school construction necessitated by new development. Montgomery County requires developers to pay school impact taxes and conducts an annual analysis of enrollment versus school capacity – to determine if the Planning Board should refrain from approving new development if schools in a part of the County are too overcrowded. Prince George’s County charges a school surcharge similar to Montgomery County’s impact tax. Fairfax County asks developers to make a cash payment based on the projected number of new students that will result from development. The District of Columbia’s Comprehensive Plan is currently working on establishing a mechanism for developer proffers to meet school facility needs.

**Water and Sewer Infrastructure.** In Montgomery County, Prince George’s County, and Fairfax County, developers are responsible for building or paying for water and sewer lines for new development. The District of Columbia’s Water and Sewer Authority (DC Water) installs water and sewer main connections, at a fee to the developer. The jurisdictions also charge developers fees that fund future infrastructure.

**Affordable Housing.** Montgomery County, Fairfax County, and the District of Columbia require developers to build affordable housing as part of new residential development. Prince George’s County does not have an affordable housing requirement for residential development but currently is considering creating a requirement in some urban areas.

## **Recommended Discussion Issues**

- #1 Would employing (more) staff with expertise in real estate economics to provide analysis during development approval processes be beneficial to Montgomery County?**
- #2 Are Montgomery County’s existing laws, policies, and requirements in line with its development priorities and with what the County wants to encourage and discourage for land use?**

# Private Development and Public Infrastructure

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## Introduction

Building new neighborhoods and new commercial buildings typically brings additional people to an area. Families move into the neighborhoods, their children attend public schools, and businesses rent space for their employees in the commercial buildings. The new people living and working in these areas drive on the roads linking the neighborhoods and buildings. New development also increases demand for public safety services and recreation options.

Historically, state or local governments have been responsible for financing and building roads, schools, and community centers and for hiring police and firefighters. At some point, governments began to require developers to help finance the cost of public amenities that are strained by new development – as a condition of receiving approval to build.<sup>1</sup> These costs are referred to as exactions.

Legally, an exaction is traditionally understood as a cost imposed by government on new development to mitigate the negative effects of development.<sup>2</sup> Exactions can include requirements for a developer to give land to the local government for public use; fees to fund the building of public infrastructure, such as roads, schools, and utilities; or requirements to build public amenities such as roads and parks.<sup>3</sup>

Exaction requirements often are found in local zoning codes and land use regulations. Land owners and developers have challenged the legality of exactions as a violation of the Takings Clause of the Fifth Amendment of the United States Constitution, which prohibits government from taking private property for public use “without just compensation.”<sup>4</sup> The U.S. Supreme Court has said, however, that state and local governments can regulate land use and impose exactions without violating the Fifth Amendment.<sup>5</sup> The government, however, must show that (1) an “essential nexus” exists between a legitimate state interest and a land use regulation or exaction and that (2) a required exaction bears a relationship to the impact of a planned development.<sup>6</sup>

This report responds to the Council’s interest in understanding the types of public infrastructure that developers are required to build or fund in Montgomery County and other local jurisdictions. The Office of Legislative Oversight (OLO) worked closely with Montgomery County Executive Branch staff and staff in the Montgomery County Planning Department to define and understand the kinds of “exactions” required of developers.

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<sup>1</sup> Newman, John, “Koontz v. St. Johns Water Management District: The Constitutionality of Monetary Exactions in Land Use Planning,” 76 *Montana Law Review* 359, 360 (2015).

<sup>2</sup> Laurie Reynolds, *Living with Land Use Exactions*, 11 *Yale Journal on Regulation* (1994).

<sup>3</sup> *Ibid.*

<sup>4</sup> US Const., amend. V. The Supreme Court has applied the same restrictions imposed on the federal government by the Takings Clause to state and local governments based on the 14<sup>th</sup> Amendment requirement of due process. See [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine).

<sup>5</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396-397 (1926). State and local governments have the authority to regulate land use under their police powers for public welfare. *Ibid.* at p. 384.

<sup>6</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 386, 388 (1994); *Koontz v. St. Johns River Water Management District*, 570 U.S. \_\_\_\_ (2013). [https://www.supremecourt.gov/opinions/12pdf/11-1447\\_4e46.pdf](https://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf)

This report examines requirements for developers to fund or build:

- Development impact taxes;
- Transportation infrastructure;
- Public schools;
- Public water and sewer infrastructure; and
- Affordable housing

This report also includes comparisons of Montgomery County laws and regulations related to the above topics to those in Prince George’s County, MD, Fairfax County, VA, and the District of Columbia.

Note that, while environmental requirements (e.g., stormwater management, forest preservation) imposed on developers also add (often significant) costs to the process of building developments and do provide benefits to the community at large, this report does not include a discussion of these types of requirements.

**Acknowledgements.** OLO spoke with dozens of people in the process of conducting research for this report. We greatly appreciate the generosity of time and effort from everyone who we spoke to.

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Department of General Services  
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Department of Permitting Services  
Department of Transportation  
Montgomery County Planning Board  
Montgomery County Planning Department  
Montgomery County Public Schools  
Office of Management and Budget

### **Prince George’s County**

Department of Housing and Community Development  
Office of Management and Budget

### **Washington Suburban Sanitary Commission**

### **Maryland Building Industry Association – Montgomery County Chapter**

**Virginia**

**Fairfax County**

Department of Management and Budget

Department of Planning and Zoning

Land Development Services

**Commonwealth of Virginia**

Virginia Department of Transportation

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## Chapter 1. Overview of Land Use and Development

This chapter provides a broad description of laws, regulations, standards, and policies that guide and/or influence development in Montgomery County to provide context for the discussion of development processes in later chapters. The chapter also describes differences between Montgomery County's laws and/or processes and those in Prince George's County, MD, Fairfax County, VA, and the District of Columbia. The first section summarizes Montgomery County laws and authority related to land use planning, development, and zoning and the various agencies and departments that have roles in the implementation of land use.<sup>1</sup>

"Land use" is a term that encompasses several inter-related disciplines, including:

**Planning** refers to developing policies, goals, and interrelated plans for private and public land use, transportation, and community facilities that are a guide for an area's future development and documented in plans – written documents and maps outlining and describing the vision.<sup>2</sup>

**Subdivision** refers to the process of dividing or consolidating one or more lots, tracts, or parcels of land.<sup>3</sup>

**Zoning** refers to establishing "zones" – "areas within which certain uses of land and buildings are permitted and certain others are prohibited"<sup>4</sup> and the laws and regulations enacted to implement building and development in the zones (e.g., the use of land, the size of lots and other open spaces, the location and size of buildings).

This OLO report focuses on the types of exactions listed in the Introduction, such as the requirement to build roads, build water and sewer infrastructure, or pay taxes to support the building of new schools. These requirements arise at different points during the land development process, such as the approval processes related to dividing land into smaller parcels for residential building or the approval processes related to building commercial and mixed-use buildings in an area around mass transit.

**"Buying" additional density.** The primary focus of this report is exactions – a term that OLO is using to mean public infrastructure that developers are required to build as part of a development project, funds that developers are required to pay to fund the building of public infrastructure, or the dedication of land for public use. Each of the jurisdictions described in this report, however, allows developers to receive additional density in a project (which, for example, allows them to build more housing units or more retail space) in exchange for providing "public amenities" as part of the project. This report does not categorize this type of development as an "exaction" because a developer is not *required* to pursue this type of development. That said, this type of development does result in developers building infrastructure or providing other benefits to the public. Section E of this chapter briefly describes how each jurisdiction manages this type of development.

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<sup>1</sup> This report uses the terms "land owner," "developer," and "builder" interchangeably to refer to the person or group of people who have the authority to seek approval for development and build on a parcel of land.

<sup>2</sup> Maryland Code, Land Use Article, § 14-101(l).

<sup>3</sup> Ibid., § 14-101(p).

<sup>4</sup> Montgomery County Code § 59-1-1.4.2 [hereinafter "MCC"].



## A. Montgomery County's Land Development Governance Structure

The processes that allow builders to develop land in Montgomery County are complicated; governed by a myriad of laws, regulations, policies, and procedures; and involve numerous departments and agencies – primarily at the local government level. State policy outlined in the Maryland code authorizes local governments to implement planning and zoning controls to facilitate “the orderly development and use of land and structures” and that these controls will necessarily limit or displace economic competition by property owners or users.<sup>5</sup>

Montgomery County's planning and land use powers also come from the State, which has delegated broad decision-making authority in these realms to entities in the County including the Maryland-National Capital Park and Planning Commission (M-NCPPC or “the Commission”), the Montgomery County Planning Board<sup>6</sup> (“Planning Board”), and the County Council.<sup>7</sup> The Maryland Constitution and two articles of the Maryland Code outline the authority – the Express Powers Act in the Local Government Article gives the County authority to “enact local laws relating to zoning and planning” and the Land Use article established M-NCPPC and the Planning Board and authorizes the Council to adopt local laws.

M-NCPPC is a bi-county agency established by State law that administers local parks and provides land use planning for development in Montgomery County and Prince George's Counties. The Commission has 10 members – five appointed by each County. The five members from Montgomery County make up the Montgomery County Planning Board, which has authority over planning and zoning in Montgomery County.<sup>8</sup> Specifically, the Maryland Code outlines the following powers of the Planning Board:

- Planning,
- Subdivision,
- Zoning,
- Assignment of street names and house numbers, and
- Administration of subdivision regulations.

State law requires the Commission to adopt a general plan for development that establishes parameters for physical growth and guides the planning and development of communities. The general plan considers existing and forecasted factors such as:

- Population,
- Employment,
- Public services,
- Transportation,
- Housing,
- Existing land use,
- Staging of development,
- Physical resources and land conditions, and
- Archaeological/historical sites.<sup>9</sup>

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<sup>5</sup> Maryland Code, Land Use Article, §§ 21-102(a), (b).

<sup>6</sup> A subset of the Maryland-National Capital Park and Planning Commission.

<sup>7</sup> The Maryland-Washington Regional District consists of Montgomery and Prince George's Counties with some limited exceptions. Maryland Code, Land Use Article, § 20-101. With respect to its zoning authority, State law refers to the County Council as the District Council – referring to its authority over the part of the regional district located in Montgomery County. Maryland Code, Land Use Article, § 22-101. For simplicity, this report uses the terms “Council” or “County Council” instead of “District Council.”

<sup>8</sup> <http://www.mncppc.org/27/About-Us>; Maryland Code, Land Use Article, § 20-202.

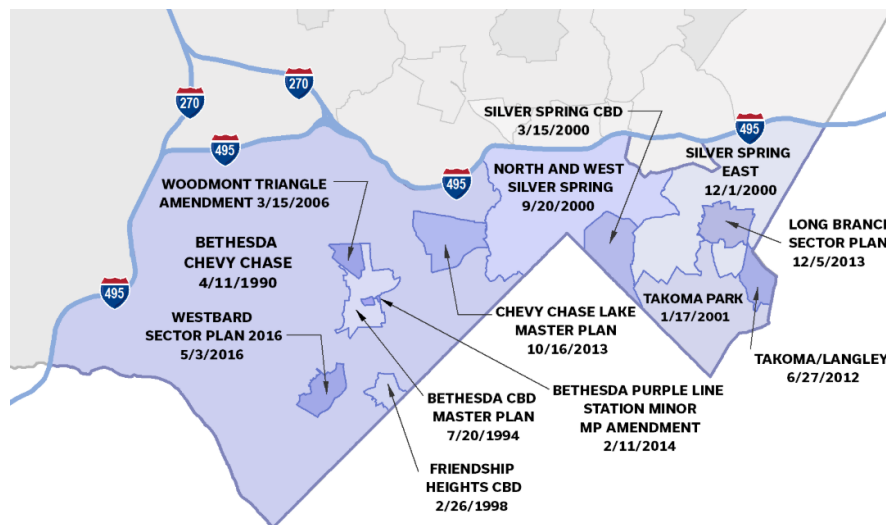
<sup>9</sup> Ibid., § 21-104(b).

M-NCPPC adopted a general plan for Montgomery County and Prince George's County in 1964. *On Wedges and Corridors: A General Plan for the Maryland-Washington Regional District in Montgomery and Prince George's Counties*<sup>10</sup> describes the region in terms of developed "corridors" along major roadways with residential or agricultural "wedges" in between the corridors. The general plan (and master plans, described below) serve as recommendations related to development except when the law requires development to conform to specifications in a plan – at which point they have the force of law.

State law also requires that the Commission adopt a map, approved by the County Council, that divides the County into local planning areas and develop and adopt a master plan for each planning area that is more detailed than the general plan.<sup>11</sup> The Commission can also adopt functional master plans – which outline parameters for growth and development of specific elements in the County such as transportation, hospitals, parks, public safety facilities, and utilities.<sup>12</sup> A vote of at least three Commissioners from the Montgomery County Planning Board is required to adopt a master plan or functional master plan that lies only in Montgomery County.<sup>13</sup>

**Master Plans and Sector Plans.** Master plans and sector plans "recommend land uses, zoning, transportation, schools, parks, libraries and fire and police stations as well as address housing, historic preservation, pedestrian and train systems and environmental issues."<sup>14</sup> The Planning Department, Planning Board, and Council collaborate to adopt master plans and sector plans for the various sections of the County – developing a plan for each section approximately every 15 to 20 years. The Planning Department has divided the County into three areas to focus master planning and regulatory efforts strategically:

#### Area 1



<sup>10</sup> [http://www.montgomeryplanning.org/community/general\\_plans/wedges\\_corridors/wedges\\_corridors64.shtm](http://www.montgomeryplanning.org/community/general_plans/wedges_corridors/wedges_corridors64.shtm).

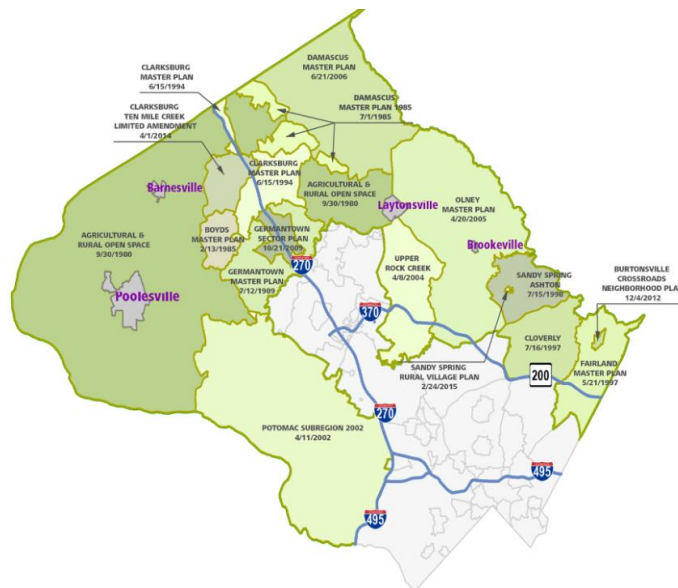
<sup>11</sup> Maryland Code, Land Use Article, § 21-105.

<sup>12</sup> Ibid., § 21-106.

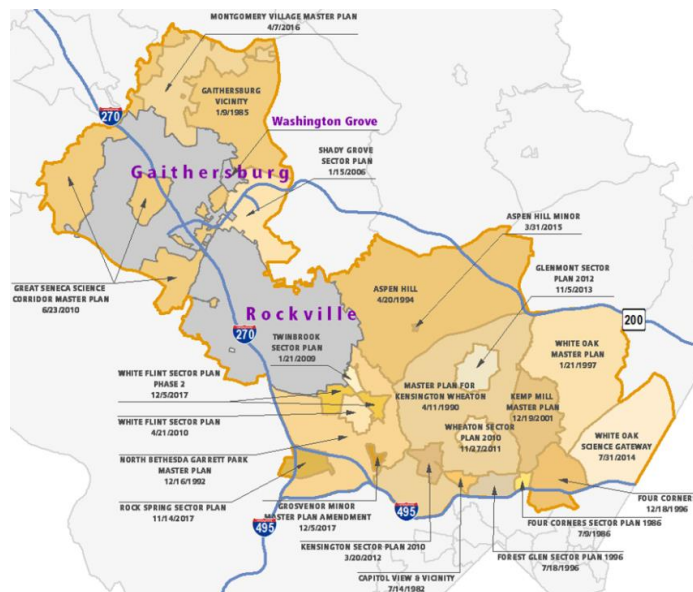
<sup>13</sup> Ibid., § 21-203.

<sup>14</sup> See <http://montgomeryplanning.org/planning/master-plan-list/>. A Sector Plan is a detailed plan for a portion of a master plan area that is adjacent to transit or covering a central business district or other small area characterized by intense development.

## Area 2



## Area 3



As the maps show, each area is subsequently divided into smaller master plan and sector plan areas. The Planning Department initially creates a draft master plan or sector plan that the Planning Board reviews and revises. Following adoption by the Planning Board, the County Council reviews, revises if desired, and approves a plan. Following approval, the Council will enact a sectional map amendment that rezones the entire area covered by a plan to match the recommended zoning in the plan.<sup>15</sup>

<sup>15</sup> The Council or the Planning Board can initiate rezoning through a Sectional Map Amendment (rezoning of a substantial area of the County) or a District Map Amendment (rezoning of the entire County). MCC § 59-7.2.3. The Planning Board also can initiate a Corrective Map Amendment to correct an administrative or technical error in the zoning map. MCC § 59-7.2.2.

**Other Entities.** Montgomery County laws related to planning, zoning, and subdivision include additional actors in the processes for review and approval of development in the County, including the Hearing Examiner, Planning Department, and Development Review Committee (DRC). The Hearing Examiner conducts hearings, gathers evidence, and drafts reports and recommendations for the County Council related to local map amendments (rezoning of individual parcels of land).<sup>16</sup> The Planning Department, led by the Planning Director, supports the work of the Planning Board – developing master and sector plans, reviewing and making recommendations to the Planning Board on development applications, and conducting research and compiling data to facilitate decision-making by the Planning Department and Planning Board.<sup>17</sup> The Development Review Committee (DRC) is an inter-agency task force facilitated by Planning Department staff that reviews development applications and prepares recommendations for the Planning Board. DRC members include the County Departments of Permitting Services, Environmental Protection, and Transportation, the State Highway Administration, the Washington Suburban Sanitary Commission, and utility companies.<sup>18</sup>

The following sections describe processes that developers must follow to receive approval from the County Government to develop land, including zoning, subdivision, permitting, and a review of public facilities.

## 1. Zoning

State law authorizes the Council to adopt local zoning laws and accompanying zoning maps that regulate, among other things, the use of land, the size of lots and other open spaces, and the location and size of buildings in Montgomery County.<sup>19</sup> The County's Zoning Ordinance<sup>20</sup> states that its purpose is to establish requirements to:

- Control street congestion;
- Promote health, public safety, and general welfare;
- Provide adequate light and air;
- Promote the conservation of natural resources;
- Prevent environmental pollution;
- Avoid an undue concentration of population; and
- Promote or facilitate adequate transportation, water, sewerage, schools, recreation, parks, and other public facilities.<sup>21</sup>

The Zoning Ordinance creates a system of zones – “areas within which certain uses of land and buildings are permitted and certain others are prohibited”<sup>22</sup> and the Council has broad authority to define the types of zones in the County, the division of land into different zones, and the allowed uses in each zone, with the caveat that the laws governing development in a type of zone be uniform within that zone.<sup>23</sup>

<sup>16</sup> MCC § 7.6.2.

<sup>17</sup> <http://montgomeryplanning.org/about-planning/mission/>.

<sup>18</sup> <http://montgomeryplanning.org/development/development-review/>.

<sup>19</sup> Maryland Code, Land Use Article, § 22-104.

<sup>20</sup> Montgomery County Code Chapter 59.

<sup>21</sup> MCC § 59-1-1.2.1.

<sup>22</sup> MCC § 59-1-1.4.2. The Planning Board has created a document explaining how to use the Zoning Ordinance. See <http://www.montgomeryplanning.org/development/zoning/documents/UseoftheZoningOrdinanceFINAL.pdf>.

<sup>23</sup> Maryland Code, Land Use Article, § 22-201.

Very broadly speaking, Montgomery County's Zoning Ordinance outlines requirements for:

- The types of uses that can occur on a lot or site or in a building in specific zones (e.g., residential, commercial, mixed-use, agricultural, industrial);
- Whether a use of land is permitted, limited (must meet standards in the law), or conditional (must meet standards in the law and be approved by the Montgomery County Hearing Examiner);
- Both minimum and maximum standards related to issues such as residential lot size or number of residential units per acre of land, minimum number of parking spaces, road widths, and driveway dimensions;
- Requirements to build or provide certain features or pay fees or taxes (e.g., building affordable housing, providing open space, providing parking); and
- The information and data that a developer or land-owner must submit to receive approval of a plan to build.

As stated at the beginning of the chapter, zoning can refer to the process of assigning a zone to a parcel of land and it can refer to the body of laws and regulations that determine how land within a particular zone can be used. In Montgomery County, the Council rezones individual parcels of land based on the recommended use in a master plan or sector plan – after the Council has adopted a new plan. Parcels are assigned to one of six broad zoning categories – agricultural, rural residential, residential, commercial/residential, employment, and industrial – with each category (except agricultural) further divided into more specific zones (e.g., residential detached, residential townhouse, commercial residential town, neighborhood retail, light industrial).

A land owner/developer can request a change to the zone assigned to a parcel of land (called a local map amendment) in only three circumstances: (1) to request a “floating zone,” (2) if the character of a neighborhood has changed substantially since a parcel was last zoned, or (3) the Council made a mistake in the past rezoning. Rezonings due to a substantial change in the character of a neighborhood or due to a mistake are rare.

“Floating zones” provide alternative standards to the base zone standards to allow flexibility in development, allowing different densities, mixed building types (e.g., residential and commercial), and flexibility in areas such as lot size and open spaces compared to the base standards in a zone.<sup>24</sup> An applicant for a floating zone must obtain approval for a local map amendment, which requires review by the Planning Department, a public hearing before the County Hearing Examiner, and approval by the County Council.<sup>25</sup>

**Review Processes in the Zoning Ordinance.** Many types of development projects in Montgomery County require Planning Board review and approval prior to the building process. The two primary review processes in the Zoning Ordinance are sketch plans and site plans.

A sketch plan “describes a project at an early stage to provide the public and the Planning Board the chance to review a proposed development for general design, density, circulation, public benefits, and

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<sup>24</sup> MCC §§ 59-5.1.2; 59-5.1.3. Floating zones can only be applied to parcels zoned as residential, commercial/residential, employment, or industrial.

<sup>25</sup> MCC §§ 59-5.1.2; 59-7.2.1.

relationship to the master plan before a developer is required to expend significant resources on design and engineering.”<sup>26</sup> Optional method development in the CRT, CR, EOF, or LSC zones requires approval of a sketch plan.<sup>27</sup>

The approval process for a sketch plan does not require review of the plan by the Development Review Committee or other County or State departments or agencies. The Planning Director provides a report and recommendation to the Planning Board on a sketch plan application.<sup>28</sup> To approve a sketch plan, the Planning Board must find, among other things, that the proposed development:

- Meets the objectives, requirements, and standards in the Zoning Ordinance;
- Substantially conforms with master plan recommendations; and
- Includes “satisfactory” elements related to transportation (i.e., vehicular, pedestrian, etc.).<sup>29</sup>

Following approval of a sketch plan, a developer must also submit and receive approval of a site plan.<sup>30</sup>

A site plan “provides a detailed overview of the applicant’s development” and is used to “determine if the proposed development satisfies current laws, regulations, and [the Zoning Ordinance], and substantially conforms with the recommendations of the applicable master plan and approved guidelines.”<sup>31</sup> The Zoning Ordinance requires approval of a site plan for many types of developments – typically based on the base zone of the land, the proposed use of the land, and the proposed size/density (e.g., # of units, gross floor area, building height).<sup>32</sup>

Site Plans are initially reviewed by the Development Review Committee<sup>33</sup> and the Planning Director subsequently provides a report and recommendation to the Planning Board on a site plan application.<sup>34</sup> To approve a site plan, the Planning Board must find, among other things, that the proposed development:

- Satisfies previous approvals that apply to the site;
- Will be served by adequate public facilities (schools, roads, public safety, water and sewer); and
- Satisfies requirements related to stormwater management, and forest conservation.<sup>35</sup>

## 2. Subdivision.

“Subdivision” is the division or assembly of a parcel(s) of land into one or more parcels for the purpose of sale or building. If a developer has a large parcel of land and wants to divide it into separate parcels and build on them individually, the developer must go through the subdivision process.

<sup>26</sup> MCC § 59-7.3.3.A.

<sup>27</sup> MCC § 59-7.3.3.A.

<sup>28</sup> MCC § 7.3.3.D.

<sup>29</sup> MCC § 59-7.3.3.E.

<sup>30</sup> MCC § 59-7.3.3.G.

<sup>31</sup> MCC § 59-7.3.4.

<sup>32</sup> See MCC § 59-7.3.4.A.8.

<sup>33</sup> MCC § 59-7.3.4.D.1.

<sup>34</sup> MCC § 7.3.3.D.

<sup>35</sup> MCC § 59-7.3.4.E

State law outline's the Council authority to enact laws related to subdivision.<sup>36</sup> Under County law, the Council has given the Planning Board authority to administer the subdivision of land.<sup>37</sup> Local subdivision laws can include requirements to:

- Build roads;
- Provide open spaces;
- Payment of fees in lieu of dedicating land;
- Reserve land for public buildings, parks, roads, mass transit, and other public purposes;
- Produce transportation and water and sewer facilities;
- Meet stormwater management requirements;
- Manage growth and development via the staging of development;
- Preserve natural or cultural features and historic sites or structures; and
- Avoid "scattered or premature subdivision or development of land because of the inadequacy of transportation, water, sewerage, drainage, school, or other public facilities."<sup>38</sup>

Several provisions in the County Subdivision Regulations (the common term for the County law on subdivision of land) establish or relate to requirements that developers must meet to subdivide and build on land. Among other requirements, developers must:

- Design and build roads, sidewalks, drainage, and other "integral facilities" in new subdivisions as required by County or state agencies.<sup>39</sup>
- Build improvements to existing roads, sidewalks, etc., that touch upon a new subdivision.<sup>40</sup>
- Provide street lights and build traffic calming features.<sup>41</sup>
- Install public or private water and sewage disposal systems.<sup>42</sup>
- Install pipelines, electric power and energy lines, and telecommunication lines.<sup>43</sup>
- Comply with the County's adequate public facilities ordinance (APFO), which assesses whether adequate facilities exist to serve the new subdivision and requires developers to build or contribute to the funding of additional public facilities if current facilities are not sufficient to support the new subdivision.<sup>44</sup>
- Comply with forest conservation laws.<sup>45</sup>

**Subdivision Process.** Developers wishing to subdivide and build on land must file an application for a preliminary plan of subdivision with the Planning Board that includes detailed information describing the location of lots, easements, existing or proposed roads, utilities, topography, sidewalks and other pedestrian

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<sup>36</sup> Maryland Code, Land Use Article, § 23-104.

<sup>37</sup> MCC § 50.1 et seq.; § 50.3.4.

<sup>38</sup> Maryland Code, Land Use Article, §§ 23-104, 23-106.

<sup>39</sup> Ibid., § 23-103(c); MCC § 50.4.3.E.2.b.

<sup>40</sup> MCC § 50.4.3.E.3.b.

<sup>41</sup> MCC §§ 50.4.3.E.5.f; 50.4.3.E.5.g.

<sup>42</sup> MCC § 50.4.3.F.

<sup>43</sup> MCC § 50.4.3.I.

<sup>44</sup> MCC § 50.4.3.J.

<sup>45</sup> MCC § 50.4.3.K.

and bicycle facilities, open spaces, and the proposed use of all lots.<sup>46</sup> The Director of the Planning Department refers applications to the Development Review Committee (DRC), an inter-agency task force that discuss applications at regularly scheduled meetings. Each agency on the DRC reviews applications and can submit written comments that will be included in an application's file. DRC review can include:

- The Washington Suburban Sanitary Commission (WSSC) (\*public water and sewer);
- County Executive (\*adequate public facilities);<sup>47</sup>
- Department of Transportation (\*roads; master planned facilities; conformance with design standards, e.g.);
- Department of Permitting Services (\*well and septic; fire access; stormwater management);
- Department of Environmental Protection;
- Montgomery County Fire and Rescue Service;
- Montgomery County Public Schools;
- Municipalities that have requested review of preliminary plans for land in the municipality;<sup>48</sup>
- Local utility providers;
- State Highway Administration; and
- Appropriate federal agencies.<sup>49</sup>

Approval is required from the entities above noted with an asterisk before the Planning Board can approve a preliminary plan.<sup>50</sup> Preliminary plan approval requires findings from the Planning Board that:

- The preliminary plan conforms to the master plan;
- Public utilities will be adequate to support the subdivision;
- The plan satisfies the County's Forest Conservation Law;
- The plan satisfies laws on stormwater management, water quality, and floodplains; and
- Any other provisions specific to the property.<sup>51</sup>

Preliminary plans approved after March 31, 2017 are valid for 36 months (or up to 36 months per phase for a multi-phase preliminary plan).<sup>52</sup>

Following subdivision approval, the developer must file a "plat" with the Planning Board and record it in the County land records.<sup>53</sup> A plat is a scale drawing of land recorded in a jurisdiction's land records that shows how the land is divided and existing or proposed features such as roads, easements, land dedication(s), and location of utilities. The Planning Board must approve a plat before it can be recorded in the land records.<sup>54</sup>

<sup>46</sup> MCC § 50.4.1. The Planning Department publishes a checklist of submission requirements for preliminary plans at <http://montgomeryplanning.org/wp-content/uploads/2017/11/Preliminary-Plan-Upload-Checklist-Submission-Requirements-2017-12-6-2.pdf>.

<sup>47</sup> Maryland Code, Land Use Article, §§ 23-202(b).

<sup>48</sup> Ibid., § 23-202.

<sup>49</sup> MCC § 50.4.2(A).

<sup>50</sup> MCC § 50.4.2(B)(2).

<sup>51</sup> MCC § 50.4.2.D.

<sup>52</sup> MCC § 50.4.2.G.

<sup>53</sup> MCC § 50.3.2.

<sup>54</sup> Maryland Code, Land Use Article, § 23-302.



### 3. Permitting

The Montgomery County Department of Permitting Services (DPS) issues permits for building construction and alteration in Montgomery County. Developers of residential and commercial building must apply for and receive a permit from DPS before they can begin construction of a project.<sup>55</sup> DPS is responsible for ensuring that a development meets certain subdivision, zoning, and other requirements before issuing a building permit for the development. Among other requirements, DPS must verify:

- A building is located on land with a plat recorded in the County land records;<sup>56</sup>
- Compliance with regulations related to water, sewer, drainage, plumbing, and gas;<sup>57</sup>
- Compliance with zoning regulations;<sup>58</sup> and
- That the Planning Board has performed an adequate public facilities assessment for the project.<sup>59</sup>

The director of DPS must submit certain applications for a building permit to the Planning Director to receive written confirmation that the proposed development complies with the Zoning Ordinance and has all necessary approvals from and has satisfied all conditions required by the Planning Department and Planning Board.<sup>60</sup> DPS can order a developer or builder to stop construction on a project if the construction is in violation of the law.<sup>61</sup>

### 4. Review of Public Facilities

Montgomery County laws, regulations, policies, and guidelines establish a mechanism for planners to evaluate whether public facilities will be adequate to accommodate additional traffic and people that proposed development projects will bring to an area. The Planning Board is charged with enforcing the County's Adequate Public Facilities Ordinance (APFO), which states:

The Planning Board must not approve a preliminary plan of subdivision unless the Board finds that public facilities will be adequate to support and service the area of the proposed subdivision. Public facilities and services to be examined for adequacy include roads and public transportation facilities, sewerage and water service, schools, police stations, firehouses, and health clinics.<sup>62</sup>

Various sections of the County Code also require different types of development projects to undergo an APFO determination.

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<sup>55</sup> MCC § 8-24(a).

<sup>56</sup> MCC § 8-1(c).

<sup>57</sup> MCC § 8-26(f).

<sup>58</sup> MCC § 8-26(g).

<sup>59</sup> MCC § 8-31(a).

<sup>60</sup> MCC § 8-1(f).

<sup>61</sup> MCC § 8-20.

<sup>62</sup> MCC § 50-35(k). Even though this is a chapter of the County Code, Chapter 50, Subdivision of Land, commonly is referred to as the "Subdivision Regulation."

- If a project requires platting, APFO review occurs during preliminary plan review,
- If a project only requires a site plan, APFO review occurs during site plan review, and
- If a project requires neither platting nor a site plan, APFO review occurs prior to issuance of a building permit.<sup>63</sup>

Once every four years, the Council adopts guidelines for administration of the Adequate Public Facilities Ordinance – called the Subdivision Staging Policy (SSP).<sup>64</sup> The Council adopted the most recent SSP in November 2016, with an effective date of January 1, 2017.<sup>65</sup> The SSP indicates that the Planning Board should determine whether public facilities are adequate to serve a new subdivision by “predicting future demand from private development and comparing it to the capacity of existing and programmed public facilities.”<sup>66</sup>

The Planning Board uses two tests to determine whether adequate public facilities exist – for transportation and schools (described in more detail in later chapters). The SSP also includes general language for determining the adequacy of police, fire, and health facilities and water and sewerage facilities.

## B. Prince George’s County

**Rezoning of parcels of land.** Prince George’s County’s land development processes include a key difference from Montgomery County’s processes. Prince George’s County’s Zoning Ordinance allows developers to request rezoning of an individual parcel of land in certain circumstances through a local map amendment. The Zoning Ordinance includes several zones that allow flexibility in design and implementation of a development. Examples include:

- **Comprehensive Design Zone:** Allows “imaginative” use of land to improve “the total environment” and “lessen the public costs associated with land use and development” in areas where demand for housing, commercial, or industrial uses are “undergoing substantial and rapid changes, requiring improved methods of land use and control...”<sup>67</sup>
- **M-X-T zone – Mixed Use – Transportation Oriented:** Allows development and redevelopment near major transportation interchanges, intersections, and transit stops.<sup>68</sup>
- **M-U-TC zone – Mixed-Use Town Center:** Allows reinvestment and redevelopment of older commercial areas with a mix of commercial and residential uses while promoting the preservation of existing buildings and keeping “the existing fabric” of the community.<sup>69</sup>

The Zoning Ordinance outlines the procedures that developers have to follow to request rezoning of a specific parcel, the types of development review required, and the criteria that a developer must satisfy in order to receive approval from the District Council for rezoning.<sup>70</sup> Montgomery County law only allows

<sup>63</sup> MCC § 8-31(a). County law prohibits the Director of Permitting from issuing a building permit without the Planning Board’s APFO determination. MCC §§ 8-30(b), 8-31.

<sup>64</sup> MCC § 33A-15(a)(3).

<sup>65</sup> See Council Resolution 18-671, 2016-2020 Subdivision Staging Policy (Nov. 15, 2016) [hereinafter 2016-2020 SSP].

<sup>66</sup> 2016-2020 SSP, at p. 2.

<sup>67</sup> Prince George’s County Code § 27-476(a) [hereinafter “PGCC”].

<sup>68</sup> PGCC § 27-542(a).

<sup>69</sup> PGCC § 27-546.09(a).

<sup>70</sup> See PGCC §§ 27-179 to 27-213.

developers to apply a floating zone to a parcel of land for flexible development standards – not rezone a property to a new zone.

**People’s Zoning Counsel.** Prince George’s County employs a People’s Zoning Counsel that is charged with “[protecting] the public interest and [promoting] a full and fair presentation of relevant issues in administrative [land use] proceedings in order to achieve balanced records upon which sound land use decisions can be made.”<sup>71</sup> The People’s Zoning Council can intervene in cases before the Zoning Hearing Examiner or District Council in a zoning case or the Board of Appeals in a variance case – to “appear on behalf of the interests of the public in general.”<sup>72</sup>

While Montgomery County law authorizes the establishment of a similar Office of the People’s Counsel, the position of People’s Counsel was eliminated during the FY11 operating budget process for financial savings.

**Rewrite of Zoning Ordinance.** Prince George’s County is in the process of rewriting the County’s Zoning Ordinance.<sup>73</sup> The Prince George’s County Council is scheduled to have a final vote on the legislation on October 23, 2018. If the Council approves the legislation, the County will engage in a comprehensive Countywide Map Amendment process to implement the new zones in the Ordinance. The discussions of Prince George’s County law in this report refer to the Zoning laws in effect as of October 1, 2018. According to information on the Prince George’s County online portal for the rewrite, the new Zoning Ordinance differs significantly from the former Zoning Ordinance – simplifying zones and uses, streamlining procedures, and incentivizing development in targeted locations.

### C. Fairfax County

Fairfax County’s land development processes differs in some key ways from Montgomery County’s processes.

**Comprehensive Plan.** Similar to Montgomery County’s General Plan, Virginia State law requires Fairfax County to develop a comprehensive plan for the County.<sup>74</sup> Fairfax County’s Board of Supervisors adopts Fairfax’s Comprehensive Plan and the laws and programs to implement it.<sup>75</sup> The Comprehensive Plan is a “guide to long-range physical growth and development of the County and is used as the basis for land use decisions.” The plan includes a policy component that outlines goals and policies on specific functional elements land use, public facilities, and transportation.<sup>76</sup>

Other components of the Comprehensive Plan describe recommended uses of land envisioned by the County, including recommended uses for specific parcels of land. The Board of Supervisors amends policies and specific recommendations of the Plan periodically.<sup>77</sup> Unlike when the Montgomery County

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<sup>71</sup> See PGCC § 27-136.

<sup>72</sup> See PGCC § 27-139.01.

<sup>73</sup> See <https://pgccouncil.us/589/Zoning-Ordinance-Rewrite-Portal> for information related to this process.

<sup>74</sup> VA Code, § 15.2-2223(A). Fairfax County’s comprehensive plan and all associated information are located at <https://www.fairfaxcounty.gov/planning-zoning/fairfax-county-comprehensive-plan>.

<sup>75</sup> VA Code, §§ 15.2-2223(A); 15.2-2224(B).

<sup>76</sup> See <https://www.fairfaxcounty.gov/planning-zoning/zoning/land-development-process> and <https://www.fairfaxcounty.gov/planning-zoning/comprehensive-plan/policy-plan>.

<sup>77</sup> See *Fairfax County Comprehensive Plan*, Policy Plan Preface, at p. 16. <https://www.fairfaxcounty.gov/planning-zoning/sites/planning-zoning/files/assets/compplan/policy/preface.pdf>

Council adopts a Sector Plan, adoption of the Comprehensive Plan, or changes to it, does not automatically rezone parcels of land for the use recommended in the Plan.

The Comprehensive Plan may include specific goals which must be addressed for a proposal to be determined to be in conformance with the Plan. These may be in the form of development options. For example, a parcel of land may be planned for residential use at 2 – 3 dwelling units per acre (du/ac) with an option for 3 – 4 du/ac if the parcel is consolidated with adjacent land. Common recommendations include environmental protection, design considerations, protection of historical resources, accommodation of significant transportation improvements or consolidation.

In Fairfax County, a developer must first determine whether a proposed use for a parcel of land is allowed based on the parcel's existing zoning. If the Zoning Ordinance allows for the intended use, a developer often can proceed to the process of submitting a site plan or subdivision plan, described below.<sup>78</sup> If, however, the parcel is not zoned for the intended use, the developer must submit a rezoning application to change the parcel's zone. The Zoning Evaluation Division in Fairfax's Department of Planning and Zoning facilitates the rezoning application process.

**Rezoning and Proffers.** A large proportion of development projects in Fairfax County start the development process with an application to rezone property.<sup>79</sup> The Zoning Evaluation Division of the County's Department of Planning and Zoning processes rezoning applications, which require approval from the Board of Supervisors.

As a part of the rezoning process, Virginia law authorizes local jurisdictions to authorize developers to provide "proffers" – a voluntary, legally-binding agreement of a developer to limit land use in some way, undertake agreed-upon acts, and/or give money to a jurisdiction as part of a rezoning process.<sup>80</sup> The Fairfax County Planning Commission reviews all rezoning applications, holds a public hearing, and makes a recommendation on applications to the Board of Supervisors. The Board of Supervisors also holds a public hearing and makes the final decision on a rezoning application.<sup>81</sup>

Examples of proffers can include offers of monetary contributions, dedication of land for a certain purpose, and/or agreement to build an amenity. An important legal note is that the County cannot ask a developer for a proffer – proffers must be voluntarily "offered" to the County. A proffered condition accepted by the Board as part of a rezoning application becomes part of the zoning regulations related to the development

<sup>78</sup> Some parcels that are properly zoned also require approval from the Board of Supervisors or the Board of Zoning Appeals before they can proceed to the Site Plan or Subdivision Plan process, including special exceptions and special permits. See Fairfax County Zoning Ordinance Articles 7 and 8.

<sup>79</sup> See <https://www.fairfaxcounty.gov/planning-zoning/zoning/application-development-review-process> for a summary of Fairfax County's rezoning process.

<sup>80</sup> See VA Code, § 15.2-2296 et seq.; see also Edward A. Mullen & Michael A. Banzhaf, *Virginia's Proffer System and the Proffer Reform Act of 2016*, 20 Richmond Pub. Int. Law Journal 203, 204 (2017); <https://www.fairfaxcounty.gov/landdevelopment/sites/landdevelopment/files/assets/documents/pdf/forms/proffer-matrix-form-with-examples.pdf> (showing examples of proffers).

<sup>81</sup> See *Rezoning: Application Information for Conventional Zoning Districts*, at p.4.

<https://www.fairfaxcounty.gov/planning-zoning/sites/planning-zoning/files/Assets/documents/Revised%202018%20-%20Rezoning%20Conventional%2C%20C%20and%20I%20District%20Application%20Package.pdf>

and all subsequent land-use approvals (e.g., site plans, subdivision plans) must conform with the proffers.<sup>82</sup> The County's Zoning Administrator has authority to administer and enforce proffered conditions.<sup>83</sup>

Recent examples of proffers in Fairfax County include the Capital One development, which includes headquarters for Capital One and will include over a dozen other buildings with office, retail, hotel and residential space. As part of the project, the developer has proffered to build a 125,000 square foot performing arts center.<sup>84</sup> In a mixed-use project called Graham Park Plaza, the developer has proffered to contribute \$10,000 to Fairfax County for installation of devices along the primary travel routes to the development that alter traffic lights for emergency vehicles.<sup>85</sup> And, a proffer related to a hotel and office development includes a commitment to annually provide two students from Fairfax County Public Schools with internships with Thompson Hospitality (or an affiliate) for at least five years.<sup>86</sup>

In 2016, the Virginia General Assembly amended the state law regarding proffers. Prior to the change, Fairfax County could accept proffers from a developer that were not specifically related to the impact of that developer's rezoning application as long as the proffers were "reasonable."<sup>87</sup> Following the change in law, proffers for new residential development have to "address a proposed development's impacts that are 'specifically attributable' to the development."<sup>88</sup> Proffers that are not on the site of a development must expand existing capacity for transportation, public safety, public schools and/or parks and "must provide a 'direct and material benefit' to the proposed residential development."<sup>89</sup> While certain areas of Fairfax County are exempted from the change to the State proffer law, the law applies to new residential development in many areas of Fairfax County.

**Subdivision Plans and Site Plans.** Once a parcel of land is properly zoned for the developer's intended use, the developer must submit a Site Plan or Subdivision Plat for review and approval by Fairfax County's Department of Land Development Services. As in Montgomery County, subdivision and site plans in Fairfax County include key information about a development such as existing and proposed streets, agreed-to proffered conditions, water and sewer facilities, and affordable housing.<sup>90</sup>

In Fairfax County, however, the Site Plan and Subdivision processes are administrative processes and authority for plan approval lies with the Director of the Department of Land Development Services. Single-family attached and detached residential developments go through the Subdivision Plan process. Commercial, industrial, multi-family residential, and mixed-use developments go through the Site Plan process.

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<sup>82</sup> Fairfax County Zoning Ordinance § 18-204(3) [hereinafter "FCZO"].

<sup>83</sup> FCZO § 18-204(7).

<sup>84</sup> See Proffer 13 in the Clerk's letter for PCA 2010-PR-021-02 on Fairfax County LDSnet.

<http://ldsnet.fairfaxcounty.gov/ldsnet/ZAPSMMain.aspx?cde=PCA&seq=4211745>;

<https://www.bizjournals.com/washington/news/2018/08/09/building-blocks-from-maplewood-mansion-to-a-mini.html>.

<sup>85</sup> See <http://ldsnet.fairfaxcounty.gov/ldsnet/ldsdfw/4614715.PDF>.

<sup>86</sup> See <http://ldsnet.fairfaxcounty.gov/ldsnet/ldsdfw/4619541.PDF>.

<sup>87</sup> See <https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting%20materials/committees/2016/may03-development-changes-to-proffer-authority.pdf>.

<sup>88</sup> *Ibid* at p. 8.

<sup>89</sup> *Ibid*.

<sup>90</sup> FCZO § 17-106; FCC §§ 101-2-2 to 101-2-5.

**Review of Public Facilities.** Virginia state law requires a local planning commission to review proposed development plans to determine “the compatibility of proposed public facilities with the locational guidelines established in the comprehensive plan.”<sup>91</sup> Fairfax County refers to this process as a “2232 Review” because the requirement is found in § 15.2-2232 of the Virginia Code.

Fairfax County’s Comprehensive Plan includes a public facilities element outlining County goals and objectives for public facilities in general, states policies related to specific types of public facilities, and includes possible locations for future public facilities.<sup>92</sup> The Plan defines public facilities as “those facilities required to support the services and functions provided by the county government or public utility companies,”<sup>93</sup> including:

- Educational facilities;
- Libraries;
- Parks;
- Public safety facilities (e.g., police, fire, sheriff, courts); and
- Utilities and services (e.g., water and sewer, trash and recycling, electricity, telecommunications).

Staff in the Facilities Planning Branch of the Department of Planning and Zoning determine the scope of review required for a 2232 Review application. A “Feature Shown” review occurs when a public facility in a proposed development is specifically shown on the Comprehensive Land Use Plan Map or is described in the Plan’s text. Staff develop a written recommendation for the Fairfax County Planning Commission, which can grant administrative approval without a public hearing.

2232 Review applications that include public facilities not shown on or supported by the Comprehensive Plan require the Planning Commission to hold a public hearing and to determine whether the public facility’s “general location, character or extent of the proposal is in substantial accord with the County’s Comprehensive Plan.”<sup>94</sup> If required, some plans undergo a concurrent review process for a special exception or other Zoning approval.

#### **D. District of Columbia**

**Advisory Neighborhood Commissions.** District of Columbia law requires the DC Council to divide the District into areas and establish Advisory Neighborhood Commissions (ANC) in each area consisting of residents elected to the Commissions.<sup>95</sup> Currently, the District is divided into eight wards and each ward has between four and six Advisory Neighborhood Commissions – for a total of 41 Commissions.<sup>96</sup> Each ANC receives funding from the DC government and can employ staff.<sup>97</sup> DC law gives ANCs the right to “advise the District government on matters of public policy including decisions regarding planning,

<sup>91</sup> See VA Code, § 15.2-2232; <https://www.fairfaxcounty.gov/planning-zoning/public-facilities-review/process>.

<sup>92</sup> See <https://www.fairfaxcounty.gov/planning-zoning/sites/planning-zoning/files/assets/compplan/policy/pubfacilities.pdf>.

<sup>93</sup> See FCC § 2-521; Fairfax County Comprehensive Plan, Public Facilities, at p. 1.

<sup>94</sup> <https://www.fairfaxcounty.gov/planning-zoning/public-facilities-review/process>.

<sup>95</sup> Code of the District of Columbia § 1-207-38 [hereinafter “DCC”].

<sup>96</sup> <https://anc.dc.gov/>.

<sup>97</sup> DCC § 1-207-38(c); (e).

streets, recreation, social services programs, health, safety, and sanitation in that neighborhood commission area.”<sup>98</sup>

Different parts of the DC Code and regulations give ANCs authority to participate in District processes, including development processes. For example, one portion of the Zoning Regulations authorizes Planned Unit Developments (PUD) that allow flexibility in zoning requirements such as building height and density in exchange for the developer providing public benefits.<sup>99</sup> In this context, developers must submit a list of proposed public benefits (called proffers) associated with a PUD for review and comment by several entities, including the Advisory Neighborhood Commission for the area where the development site is located.<sup>100</sup>

## E. Exchange of Public Infrastructure for Additional Density

The zoning laws in the four jurisdictions described in this report each allow developers to receive additional density in a project (which, for example, allows them to build more housing units or more retail space) in exchange for providing “public amenities” as part of the project. While this report does not categorize this type of development as an “exaction” because a developer is not *required* to pursue this type of development, this type of development does result in developers building infrastructure or providing other benefits to the public. This section briefly describes how each jurisdiction approaches this type of development.

### 1. Montgomery County

Montgomery County’s Zoning Ordinance allows this type of zoning in four zones that encourage mixed-use development:<sup>101</sup>

- Commercial Residential – CR;
- Commercial Residential Town – CRT;
- Employment Office – EOF; and
- Life Sciences Center – LSC.

The Planning Board has adopted *Incentive Density Implementation Guidelines* to explain the standards and requirements developers must meet to obtain additional density in exchange for providing public benefits. The Zoning Ordinance identifies seven categories of public benefits that developers can provide and charges the Planning Board with assigning points to specific public benefits.<sup>102</sup> The next table summarizes the benefit categories and benefits included in the Zoning Ordinance.

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<sup>98</sup> DCC § 1-207-38(c)(1). As an example of the type of input that ANCs provide, see <http://www.anc6d.org/jan18.pdf> for minutes from a January 2018 ANC meeting describing input that the Commission will provide on pending development projects.

<sup>99</sup> District of Columbia Zoning Regulation, Title 11-X-300 et seq. [hereinafter “DCZR”].

<sup>100</sup> DCZR, Title 11-X-308.

<sup>101</sup> See MCC § 59-4.7 et seq; *Commercial/Residential and Employment Zones: Incentive Density Implementation Guidelines*, Montgomery County Planning Board, at p. 5 (2017) [hereinafter “*Incentive Density Implementation Guidelines*”].

<sup>102</sup> MCC § 59-4.7.2.

**Table 1-1. Examples of Public Benefits for Optional Method Development**

| <b>Public Benefit Category</b>                        | <b>Examples</b>   |  |
|---|---|--|
| Major Public Facility                                 | Library<br>School   | County Service Center<br>Bikeshare Station             |
| Transit Proximity                                     |   |  |
| Connectivity and Mobility                             | Neighborhood Services<br>Public Parking                       | Through-Block Connection<br>Transit Access Improvement |
| Diversity of Uses and Activities                      | Adaptive Buildings<br>Enhanced Accessibility for the Disabled | MPDUs<br>Small Business Opportunity                    |
| Quality Building and Site Design                      | Architectural Elevations<br>Historic Resource Protection      | Public Art<br>Public Open Space                        |
| Protection and Enhancement of the Natural Environment | Energy Conservation and Generation<br>Recycling Facility Plan | Tree Canopy<br>Vegetated Roof                          |
| Building Reuse  |   |  |

Source: MCC § 59-4.7.2

## 2. Prince George's County

As described above, Prince George's County's Zoning Ordinance allows Comprehensive Design Zones that allow "imaginative" uses of land to improve "the total environment" and "lessen the public costs associated with land use and development" in areas where demand for housing, commercial, or industrial uses are "undergoing substantial and rapid changes, requiring improved methods of land use and control...."<sup>103</sup> The Zoning Ordinance includes eight different types of design zones such as Major Activity Center, Residential Urban Development, Employment and Institutional Area, and Village Zones.<sup>104</sup> Each type of design zone includes public benefits that developers can include and associated density bonuses.<sup>105</sup> Examples include:

| <b>Public Benefit</b>   | <b>Density Bonus</b>  |
|---|-----------------------|
| • Open space at a ratio of 3.5 acres per 100 dwelling units   | 25% in dwelling units |
| • Incorporating solar access or active/passive solar energy in design   | 5% in dwelling units  |
| • Creating activity centers with space provided for quasi-public services (e.g., churches, day care centers, community meeting rooms) | 5% in dwelling units  |

<sup>103</sup> PGCC § 27-476(a).<sup>104</sup> See PGCC §§ 27-489 to 27-514.11.<sup>105</sup> See, e.g., PGCC §§ 27-491; 27-496; 27-505.



### 3. Fairfax County

Fairfax County's Zoning Ordinance includes Planned Development Districts (PDD) where developers can receive incentives for complying with certain design standards and/or providing certain amenities.<sup>106</sup> The Zoning Ordinance includes Planned Development Districts specifically for housing developments, commercial developments, community developments, mixed use developments, and the Tysons Corner Urban area.<sup>107</sup> As an example, in a Planning Development Housing District, a developer can request an increase in the number of dwelling units in a development by providing design features, amenities, open spaces, or recreational facilities that are "exceptional and high quality" and/or by preserving and restoring historic buildings.<sup>108</sup>

Unlike the laws in Montgomery County, Prince George's County, and the District of Columbia, Fairfax County's Zoning Ordinance does not list specific types of design features or amenities that will satisfy the requirements for PDDs. The Zoning Ordinance does require applications for rezoning to a PDD to conform to the County's Comprehensive Plan and to achieve the purpose of a PDD more than a development would under a conventional zoning district.<sup>109</sup>

### 4. District of Columbia

The District of Columbia's Zoning Ordinance allows for Planned Unit Developments (PUD) that provide flexibility in zoning requirements such as additional building height and density in exchange for the developer providing public benefits.<sup>110</sup> In reviewing an application for a PUD, the Zoning Regulations require the Zoning Commission to judge the value of public benefits proposed in a PUD against the degree of development incentives requested.<sup>111</sup> To approve an application for a PUD, the Zoning Commission must find that the proposed development:

- Is not inconsistent with the Comprehensive Plan and other District policies;
- Does not have unacceptable impacts on the surround area; and
- Includes public benefits consistent with the Comprehensive Plan and other District policies.<sup>112</sup>

The Zoning Regulations identify numerous examples of public benefits but developers may propose benefits that are not listed in the Regulations.<sup>113</sup> Proposed benefits must be tangible and quantifiable items with the ability to be completed or arranged before issuance of a certificate of occupancy.<sup>114</sup> Benefits can primarily benefit a particular neighborhood or area of the city or serve a critical city-wide need.<sup>115</sup> Examples of public benefits include:

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<sup>106</sup> See FCZO § 6-100 et seq.

<sup>107</sup> Ibid.

<sup>108</sup> See FCZO § 6-109(2).

<sup>109</sup> See FCZO § 6-101.

<sup>110</sup> DCZR, Title 11-X-300 et seq.

<sup>111</sup> DCZR, Title 11-X-304.3.

<sup>112</sup> DCZR, Title 11-X-304.4.

<sup>113</sup> DCZR, Title 11-X-305.5; -305.6.

<sup>114</sup> DCZR, Title 11-X-305.3

<sup>115</sup> DCZR, Title 11-X-305.3

- Superior urban design and architecture;
- Creation or preservation of open spaces;
- Commemorative works or public art;
- Affordable housing that exceeds requirements of DC's Inclusionary Zoning requirements;
- Employment and training opportunities;
- Social services and facilities such as day care or elderly care facilities;
- Space for community education or social development or promotion of the arts;
- Environmental or sustainable benefits that exceed requirements in the law;
- Outdoor children's play areas;
- Transportation infrastructure that exceed requirements in the law; and
- Mass transit improvements (e.g., shared bike stations; building Metro station entrances).<sup>116</sup>

The Zoning Commission cannot force a PUD applicant to add public benefits to a project but can deny an application if the Commission finds the benefits offered do not justify the development incentives requested in the application.<sup>117</sup>

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<sup>116</sup> DCZR, Title 11-X-305.5.

<sup>117</sup> DCZR, Title 11-X-305.11.

## Chapter 2. Development Impact Taxes

Development impact taxes (or fees or surcharges) are taxes on new development where the revenue is used to pay for infrastructure made necessary by new development. This chapter summarizes Montgomery County's development impact taxes for transportation and school construction costs and Prince George's County's surcharges for school facilities and public safety. Fairfax County does not have development impact taxes, although recommended cash proffer contributions related to school construction mirror Montgomery County's school impact taxes. See Chapter 4 for the discussion of cash proffers for school construction in Fairfax County. The District of Columbia does not have development impact taxes.

### A. Montgomery County

Development impact taxes in Montgomery County are excise taxes<sup>1</sup> imposed on new development to help fund a portion of transportation and school improvement costs made necessary by the new development.<sup>2</sup> First enacted by the Council in 1986, the law originally established a transportation-related *fee* for new development in Germantown and Eastern Montgomery County only (the fastest growing areas of the County at the time).<sup>3</sup>

The Council expanded transportation impact taxes to apply countywide in 2001 and instituted a school impact tax that applies only to residential development in 2003.<sup>4</sup> The Council amended the development impact taxes law in November 2016, effective March 1, 2017.<sup>5</sup> This section primarily describes the law as amended in November 2016.

Among other things, the 2016 amendment to the law changed the tax rates and divided the County into four policy areas plus a White Flint area for tax rate purposes, and abolished transportation mitigation payments and school facilities payments (additional payments that were required for a subset development in the County). The new legislation requires the Council to establish tax rates by Council Resolution.<sup>6</sup> The Director of Finance adjusts the tax rates on July 1<sup>st</sup> of every odd-numbered year.<sup>7</sup>

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<sup>1</sup> An excise tax is a tax on a specific good, such as gasoline, or on an activity, such as highway usage by trucks. See <https://www.irs.gov/pub/irs-pdf/p510.pdf>.

<sup>2</sup> MCC §§ 52-40(c), (d); 52-53(c), (d). The law exempts certain types of development from impact taxes, such as moderately priced dwelling units (MPDUs), and other price- and rent-controlled housing, and development in Enterprise Zones. MCC §§ 52-41(g); 52-54(c).

<sup>3</sup> Drummer, Robert and Orlin, Glenn, Government Operations and Fiscal Policy (GO) Committee Memorandum Item #2, at p. 2 (Sept. 22, 2016) [hereinafter "9-22-16 GO Packet"]. The Council converted the fee to an excise tax after the Maryland Court of Appeals held in 1990 that the County did not have the authority to establish an impact fee. [http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/cm/2016/160922/20160922\\_GO2.pdf](http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/cm/2016/160922/20160922_GO2.pdf)

<sup>4</sup> Ibid.

<sup>5</sup> Bill 37-16, Taxation – Development Impact Tax – Transportation and Public School Improvements – Amendments (enacted Nov. 15, 2016).

[http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/bill/2016/20161115\\_37-16A.pdf](http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/bill/2016/20161115_37-16A.pdf)

<sup>6</sup> MCC §§ 52-49(a), (e); 52-55(a), (d).

<sup>7</sup> MCC §§ 52-49(f), 52-55(e).

**Exemptions and Discounts from Impact Taxes.** Certain types of development are exempt from impact taxes, including:

- Moderately Priced Dwelling Units (MPDUs) and other types of affordable housing,
- All non-exempt units in a development if at least 25% of the units are affordable housing,
- Developments located in a State-designated enterprise zone, and
- Houses built by high school students under Montgomery County Board of Education programs.<sup>8</sup>

The law includes impact tax “discounts” for buildings in two situations. Developers of Productivity Housing units pay 50% of the tax rate for both transportation and school impact taxes.<sup>9</sup> Buildings located within a half mile of Montgomery County MARC stations (except Rockville and Silver Spring) pay 85% of the tax rate for transportation impact taxes.<sup>10</sup> Additionally, impact tax rates in the White Flint Special Taxing District are \$0 because the Council established an additional property tax in the District with the revenue dedicated to pay for the cost of building transportation infrastructure in the district.<sup>11</sup>

**Assessment, Collection, and Use of Development Impact Taxes.** The process for administering the development impact tax law is shared among the Department of Permitting Services (DPS), the Department of Finance, and the Department of Transportation (DOT).

DPS collects impact taxes for the County and for the Cities of Rockville and Gaithersburg. Impact taxes are imposed before DPS will issue a building permit.<sup>12</sup> Payment, however, is not due until the final inspection of a new building by DPS or six months (for single-family detached or attached residential buildings) or 12 months (for multi-family residential or non-residential development) after a permit is issued.<sup>13</sup> DPS transfers data about impact taxes collected to the Department of Finance.

DPS’ permit-tracking system, called Infor Public Sector (IPS), calculates taxes owed based on data entered into the system by DPS staff. Data that contributes to the calculation of impact taxes (e.g., data on MPDUs) is automatically transmitted to IPS nightly from the Planning Department. DOT certifies impact tax credits that may be applicable based on applications submitted by developers and transmits that information to DPS for use in managing and collecting impact tax payments (see next section in impact tax credits).

The following tables summarize current transportation and school development impact tax rates.<sup>14</sup>

<sup>8</sup> MCC §§ 52-41(g), 52-54.

<sup>9</sup> MCC §§ 52-49(c), 52-55(c).

<sup>10</sup> MCC § 52-49(d).

<sup>11</sup> MCC § 52-49(b).

<sup>12</sup> MCC §§ 52-41(a); 52-54(b).

<sup>13</sup> MCC § 52-42(l), 52-54(b).

<sup>14</sup> See <http://permittingervices.montgomerycountymd.gov/DPS/pdf/ImpactTaxesHandout.pdf> for current rates.

**Table 2-1. Transportation Development Impact Tax Rates, effective February 15, 2018**

| Land use  | Red Policy Area<br>(Metro Stations) | Orange<br>Policy Area | Yellow<br>Policy Area | Green<br>Policy Area |
|---|-------------------------------------|-----------------------|-----------------------|----------------------|
| <b>Residential</b>  |                                     |                       |                       |                      |
| (Tax per dwelling unit)   |                                     |                       |                       |                      |
| Single Family Detached  | \$7,072                             | \$17,677              | \$22,097              | \$22,097             |
| Single Family Attached  | \$5,786                             | \$14,464              | \$18,080              | \$18,080             |
| Multi-Family: Low-Rise  | \$4,499                             | \$11,247              | \$14,059              | \$14,059             |
| Multi-Family: High-Rise   | \$3,213                             | \$8,034               | \$10,042              | \$10,042             |
| Senior Residential  | \$1,285                             | \$3,214               | \$4,017               | \$4,017              |
| <b>Commercial</b>   |                                     |                       |                       |                      |
| (Tax per square foot of gross floor area)   |                                     |                       |                       |                      |
| Office  | \$6.45                              | \$16.15               | \$20.20               | \$20.20              |
| Industrial  | \$3.25                              | \$8.05                | \$10.10               | \$10.10              |
| Retail  | \$5.75                              | \$14.45               | \$18.00               | \$18.00              |
| Private School  | \$0.50                              | \$1.30                | \$1.65                | \$1.65               |
| Other Non-Residential   | \$3.25                              | \$8.05                | \$10.10               | \$10.10              |
| Bioscience, Place of Worship,<br>Hospital, Social Service<br>Agencies, Charitable,<br>Philanthropic Institution | \$0.00                              | \$0.00                | \$0.00                | \$0.00               |

Source: DPS

**Table 2-2. School Development Impact Tax Rates, Effective February 15, 2018**

| Dwelling Type           | Tax Per<br>Dwelling Unit |
|-------------------------|--------------------------|
| Single Family Detached* | \$23,062                 |
| Single Family Attached* | \$24,227                 |
| Multi-Family: Low-Rise  | \$19,937                 |
| Multi-Family: High-Rise | \$6,791                  |
| Multi-Family: Senior    | \$0                      |
| Farm – Tenant House     | \$23,062                 |

Source: DPS

\*Single family homes have a surcharge of \$2/sq. ft. of gross floor area over 3,500 sq. ft., to a maximum of 8,500 sq. ft.

County law establishes authorized uses for development impact tax revenue, summarized in the next table.<sup>15</sup>

<sup>15</sup> MCC §§ 52-40(e); 52-50; 52-53(e); 52-56.

**Table 2-3. Authorized Uses for Development Impact Tax Revenue**

|                                    |  |
|------------------------------------|--|
| <b>Transportation<sup>16</sup></b> | <ul style="list-style-type: none"> <li>• New Road construction, widening, or reconstruction associated with adding road or intersection capacity (including elements of bus rapid transit),</li> <li>• New or expanded transit center or park-and-ride lots,</li> <li>• Busses added to the County bus fleet,</li> <li>• New bus shelters,</li> <li>• Hiker-biker trails or protected bike lanes,</li> <li>• Bicycle lockers,</li> <li>• Bikesharing stations, or</li> <li>• Sidewalk connectors.</li> </ul> |
| <b>Schools<sup>17</sup></b>        | <p>Costs related to new, additions to, or modernization of public schools that increase capacity, including:</p> <ul style="list-style-type: none"> <li>• Planning design,</li> <li>• Acquisition of land,</li> <li>• Site improvements,</li> <li>• Utility relocation,</li> <li>• Construction, or</li> <li>• Initial furniture and equipment.</li> </ul>   |

The Department of Finance maintains records on the receipt and disbursement of impact taxes.<sup>18</sup> The next table summarizes development impact tax revenue from FY05 through FY18. The data show that impact tax revenue varies significantly from year-to-year.

**Table 2-4. Development Impact Tax Revenue, FY05-FY18**

| <b>Fiscal Year</b> | <b>School</b>       | <b>% Change</b> | <b>Transportation</b> | <b>% Change</b> |
|--------------------|---------------------|-----------------|-----------------------|-----------------|
| FY07               | \$9,562,889         |                 | \$11,500,814          |                 |
| FY08               | \$6,766,534         | -29%            | \$9,743,841           | -15%            |
| FY09               | \$7,925,495         | 17%             | \$2,398,310           | -75%            |
| FY10               | \$11,473,071        | 45%             | \$3,812,138           | 59%             |
| FY11               | \$14,480,846        | 26%             | \$5,444,115           | 43%             |
| FY12               | \$16,462,394        | 14%             | \$6,352,481           | 17%             |
| FY13               | \$27,901,753        | 69%             | \$13,179,898          | 107%            |
| FY14               | \$45,837,274        | 64%             | \$20,274,781          | 54%             |
| FY15               | \$32,676,773        | -29%            | \$16,632,489          | -18%            |
| FY16               | \$23,349,333        | -29%            | \$8,591,461           | -48%            |
| FY17               | \$39,286,909        | 68%             | \$14,393,086          | 68%             |
| FY18               | \$20,795,511        | -47%            | \$13,095,573          | -9%             |
| <b>Average</b>     | <b>\$19,369,583</b> |                 | <b>\$10,010,130</b>   |                 |

Source: 9-22-16 GO Packet Item, at p. 3 and Department of Finance. The Transportation Impact Tax Revenue includes Rockville and Gaithersburg impact taxes.

<sup>16</sup> MCC § 52-50.

<sup>17</sup> MCC §§ 52-56(d)(2), (3), 52-58(a)

<sup>18</sup> MCC §§ 52-45(d); 52-56(a).

**Impact Tax Credits.** Developers can get credit toward development impact taxes for building infrastructure that the County would otherwise have to build. Improvements that qualify for a tax credit are the same as the authorized uses for impact taxes summarized in Table 2-3, above.<sup>19</sup> In addition, developers can receive credit under certain circumstances for land dedicated for a school site.

Developers can also receive impact tax credit for constructing or contributing to the construction costs of new single-family residences that meet Level I Accessibility Standards, if at least five percent of the homes in a project meet the standards.<sup>20</sup>

To receive an impact tax credit, property owners must enter an agreement with the County that estimates the cost of the improvement(s) or value of land dedication, the timeframe for providing the improvement, and other necessary standards and conditions.<sup>21</sup> Either DOT or Montgomery County Public Schools (MCPS) must certify the amount of a credit before DPS issues a building permit.<sup>22</sup>

DOT reviews agreements for transportation impact tax credits and MCPS reviews agreements for school impact tax credits. DOT and MCPS verify costs and time schedules, determine whether the proposed improvement qualifies for credit, determine the amount of credit, and certifies the credit amount to DPS before DPS issues a building permit.<sup>23</sup>

For transportation impact tax credits, if the actual cost of building an improvement differs from the estimated cost, the amount of the credit must be adjusted up or down accordingly.<sup>24</sup> Additionally, developers cannot receive credit for improvements in developments approved under the Alternative Review procedure for Metro Station Policy Areas in the Subdivision Staging Plan or for improvements that primarily benefit residents of one development or a small number of developments.<sup>25</sup>

Credits issues before December 31, 2015 expire after six years. Credits issued on or after January 1, 2016 expire after 12 years.<sup>26</sup> Developers can transfer credits to a person or entity that gains an interest in property for which a credit was certified, but the credit can only be used for that property.<sup>27</sup>

**Impact Tax Refunds.** Anyone who has paid an impact tax can request a refund if:

- The County has not appropriated the funds or formally designated an improvement to be paid for with the funds – by the end of the sixth fiscal year after paying the tax;
- The building permit lapsed or was revoked because the project was not built; or
- The project was changed in a way that reduced the amount of impact tax owed.<sup>28</sup>

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<sup>19</sup> MCC §§ 52-47(b); 52-58.

<sup>20</sup> MCC §§ 52-47(j); 52-58(e).

<sup>21</sup> MCC §§ 52-47(b)(1), 52-58(b).

<sup>22</sup> MCC §§ 52-47(b)(2), 52-58(c)(5).

<sup>23</sup> MCC §§ 52-47(b)(2), 52-58(c).

<sup>24</sup> MCC § 52-47(b)(6).

<sup>25</sup> MCC § 52-47(d); (h).

<sup>26</sup> MCC §§ 52-47(b)(4); 52-58(g).

<sup>27</sup> MCC §§ 52-47(k), 52-58(h).

<sup>28</sup> MCC §§ 52-46, 52-57.

## B. Prince George's County

Prince George's County has two "surcharges" that serve purposes similar to Montgomery County's development impact taxes – a school facilities surcharge and a public safety surcharge.<sup>29</sup>

**School facilities surcharge.** Prince George's County's school facilities surcharge applies to new residential construction. Where Montgomery County's development impact tax differs by dwelling type, Prince George's County's surcharge differs by location or type of development.<sup>30</sup> Prince George's County charges \$9,550 per permit for:

- Dwellings built between Interstate 495 and the District of Columbia, and
- Dwellings in a Basic Plan or Conceptual Site Plan that abut an existing or planned mass transit rail station site operated by WMATA.

For all other buildings, the surcharge is \$16,371.

The County exempts several types of development from the school facilities surcharge, including:

- Mixed retirement developments or elderly housing;
- Graduate student housing in the City of College Park;
- Single-family attached dwellings in a residential revitalization project or in a Transforming Neighborhood Initiative Area; and
- Studio or efficiency apartments in Urban Centers and corridors, in an approved transit district overlay zone, or within ¼ mile of a metro station.<sup>31</sup>

The surcharge for the following types of development is reduced by 50%:

- Multifamily housing in a transit district overlay zone or within ¼ mile of a metro station; and
- Multifamily housing within ¼ mile of a Purple Line Station.<sup>32</sup>

Revenue from the surcharge can be used for additional or expanded public school facilities or debt service on bonds issued to pay for additional or expanded school facilities.<sup>33</sup>

Prince George's County's FY18 Approved Operating Budget reports the following fund from the school surcharge applied to debt service:

|               |                |
|---------------|----------------|
| FY16 Actual   | \$29.4 million |
| FY17 Budgeted | \$30.7 million |
| FY18 Approved | \$34.2 million |

<sup>29</sup> See PGCC §§ 10-192.01 et seq; 10-192.11 et seq.

<sup>30</sup> PGCC § 10-192.01(b); <https://www.princegeorgescountymd.gov/DocumentCenter/View/22472/School-Facilities-Surcharge-and-Public-Safety-Fees-Adjusted-PDF?bidId=>.

<sup>31</sup> PGCC § 10-192.01(b), (c)(2).

<sup>32</sup> PGCC § 10-192.01(c)(1), (c)(3).

<sup>33</sup> PCGG § PGCC § 10-192.01(f).



**Public safety surcharge.** Prince George’s County imposes a public safety surcharge on new residential construction to help fund police, fire, and emergency medical services. Like the school facilities surcharge, the public safety surcharge differs by location or type of development. The surcharge per permit for construction in the Developed Tier (as defined in the County’s General Plan) and in plans that abut an existing or planned mass transit rail state site operated by WMATA is \$2,578. The surcharge is \$7,730 for all other buildings.<sup>34</sup>

### C. Fairfax County

Fairfax County does not have any development impact taxes. Fairfax County does publish a suggested proffer contribution amount for developers requesting rezoning for residential developments. The County estimates the number of new students that result from construction of an additional residential unit – based on the type of unit. Once a developer has calculated the estimated number of new students that will result from new residential development, that number is multiplied by the County’s per-student recommended proffer contribution – currently \$12,262 per student. The resulting amount is the “recommended” proffer amount. See Chapter 4 for a more detailed description of school proffers in Fairfax County.

### D. District of Columbia

The District of Columbia does not have any development impact taxes.

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<sup>34</sup> <https://www.princegeorgescountymd.gov/DocumentCenter/View/22472/School-Facilities-Surcharge-and-Public-Safety-Fees-Adjusted-PDF?bidId=>.

## Chapter 3. Transportation Infrastructure

All of the jurisdictions surveyed require developers to construct transportation-related infrastructure in new developments or to mitigate impacts to the transportation system due to new development. In this context, transportation infrastructure includes roads, mass transit, and bicycle transportation and pedestrian travel. This chapter describes how Montgomery County analyzes the impact of new development on transportation and requirements on developers related to transportation. The chapter then describes some differences in how Prince George's County, Fairfax County, and the District of Columbia analyze development impact on transportation infrastructure.

### A. Montgomery County

Montgomery County requires developers to contribute to the development of transportation infrastructure both by (1) building roads and other infrastructure related to a development and (2) through the payment of development impact taxes (discussed in depth in Chapter 2). This section summarizes the laws, regulations, and policies that establish requirements to build transportation infrastructure.

As described in Chapter 1, the Planning Board is required to evaluate whether there are adequate public facilities to support a development project before approving a preliminary plan, site plan, or before the issuance of building permits – and cannot approve a project that will not be supported by adequate public facilities. The County's Subdivision Staging Policy provides guidance to the Planning Board on conducting this analysis with respect to transportation infrastructure.

**Local Area Transportation Review.** County requirements dictate that “the Planning Board must not approve a development if local area transportation conditions are deemed inadequate.”<sup>1</sup> The Planning Board uses a series of tests to determine transportation adequacy called the Local Area Transportation Review (LATR) – examining a proposed development's impact on motor vehicle, transit, and bike transportation and pedestrian travel.

Through the Subdivision Staging Policy (SSP), the Council has established County-wide standards and procedures for LATR studies and area-specific standards for areas such as the White Flint Policy Area, Silver Spring, and the Great Seneca Science Corridor.<sup>2</sup> The SSP defines “adequacy” with respect to the adequate public facilities ordinance for each of the four modes of transportation (vehicle, transit, bike, pedestrian).

The Planning Board, in turn, has issued Local Area Transportation Review Guidelines (“LATR Guidelines”) to enforce the LATR standards in the SSP. The LATR Guidelines outline how developers must analyze the impact of proposed development on transportation in the County.<sup>3</sup> If an LATR shows that a development project will increase transportation use above a certain threshold, the developer must either construct components to mitigate the increases or make a payment to the County to fund County-constructed transportation solutions.<sup>4</sup>

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<sup>1</sup> *Local Area Transportation Review Guidelines*, Montgomery County Planning Board, at p. 8 (Fall 2017) [hereinafter “LATR Guidelines”].

<sup>2</sup> 2016-2020 SSP, at pp. 4-7.

<sup>3</sup> *LATR Guidelines*, at p. 8.

<sup>4</sup> *Ibid.*, at pp. 13-14.

The standards in the LATR Guidelines measure a development's impact on "peak-hour person trips" – a measure of the public's transportation use in an area. Projects predicted to generate at least 50 additional total weekday peak-hour person trips in any of the four modes of transportation (vehicle, transit, bike, pedestrian) must undergo an LATR study. Projects predicted to generate fewer than 50 additional person trips can submit supporting data in a transportation statement and receive an exemption from the LATR.<sup>5</sup>

Projects that submit the following types of applications are subject to LATR requirements:

- Preliminary plans (as part of subdivision),
- Site plans (not part of subdivision),
- Conditional use and zoning cases before the Board of Appeals and Council, and
- Building permit applications that do not require a preliminary or site plan.<sup>6</sup>

Planning Department staff work with developers to create the scope of an LATR study and study results must be completed before and submitted as a part of a development application.<sup>7</sup>

The LATR Guidelines prioritize the types of mitigation approaches for projects when an LATR study shows a need for transportation mitigation – while also giving the Planning Board flexibility in implementation. In order of priority, mitigation approaches include:

- Transportation Demand Management approaches to reduce vehicular demand,
- Pedestrian or bicycle improvements,
- Transit facility or service improvements,
- Intersection operational improvements, and
- Roadway capacity improvements.<sup>8</sup>

**Transportation Management Districts and Traffic Mitigation Agreements.** County law authorizes the Council to establish a transportation management district (TMD) as a way to achieve transportation demand management goals. The purpose of a TMD is to:

- Help provide sufficient transportation capacity to accommodate County land use objectives,
- Reduce demand for road capacity while improving traffic and pedestrian safety, and
- Reduce vehicle emissions, energy use, and noise.<sup>9</sup>

The Council has established TMDs in Bethesda, Friendship Heights, Greater Shady Grove, North Bethesda, Silver Spring, and White Oak.<sup>10</sup>

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<sup>5</sup> Ibid., at p. 8.

<sup>6</sup> Ibid., at p. 10.

<sup>7</sup> Ibid., at p. 19.

<sup>8</sup> Ibid., at p. 13.

<sup>9</sup> MCC § 42A-22(c).

<sup>10</sup> See also OLO Report 2016-9, *Performance Review of Transportation Management Districts*.  
<http://www.montgomerycountymd.gov/OLO/Resources/Files/2016%20Reports/OLO%20Report%202016-9%20Performance%20Review%20of%20Transportation%20Management%20Districts.pdf>.

County law authorizes the Planning Board and the Department of Transportation (DOT) to jointly require developers building in TMDs to enter into Traffic Mitigation Agreements (TMAGs – pronounced “tee-mag”) with the County as a condition of development.<sup>11</sup> TMAGs are contractual agreements between the County Government and a developer that outline transportation demand management approaches that a developer will take to mitigate increased traffic from a new development. As stated above in the description of local area transportation review, Transportation Demand Management (TDM) approaches are the preferred approach for traffic mitigation under the LATR guidelines.

If the Planning Board and DOT require a TMAG, County law requires that a development applicant, the Board and DOT all agree with the TMAG, that the TMAG be an express condition of a development approval, and that the TMAG be recorded in County land records.<sup>12</sup> TMAGs can require:

- The appointment of a transportation coordinator,
- Limits on parking spaces,
- Peak period or single-occupancy vehicle parking charges,
- Preferential parking for carpools or vanpools,
- Subsidies for employees not using single-occupancy vehicles,
- Provision of transit or vanpool subsidies for employees,
- Financial or other participation in building or operating transportation facilities or systems,
- Providing space on a periodic basis for marketing and promotional activities of the transportation management district,
- Designing permanent and prominent areas to display information on commuting options, or
- Other transportation demand management measures.<sup>13</sup>

DOT representatives report that TDM approaches to traffic mitigation are increasingly DOT’s preferred option for new development – especially in transportation management districts – rather than requiring developers to add road capacity because adding road capacity can reduce an area’s capacity for non-auto types of transportation, such as transit, walking, and biking. DOT prefers that developers implement mitigation measures to manage transportation demand rather than build new roads that increase supply.

**Mitigation Payments.** In designated parts of the County – such as some town centers and bicycle pedestrian priority areas – where the County has identified a need to coordinate transportation solutions, the Planning Board can allow a developer to make a mitigation payment in lieu of constructing components to mitigate increased traffic.<sup>14</sup> The LATR Guidelines allow mitigation payments when construction of mitigation components requires:

- Coordination of multiple projects,
- Acquisition of an offsite right-of-way, or
- A disproportionate cost burden on an applicant.<sup>15</sup>

These types of payments are rarely required or received.

<sup>11</sup> MCC §§ 42A-23(d); MCC § 42A-25(a).

<sup>12</sup> MCC § 42A-25(d).

<sup>13</sup> MCC § 42A-25(b).

<sup>14</sup> LATR Guidelines, at p. 14.

<sup>15</sup> Ibid., at p. 14.

**Unified Mobility Programs.** The 2016-2020 Subdivision Staging Policy includes a new provision that lets the Council establish Unified Mobility Programs (UMPs). The premise behind creating an UMP is to more evenly spread the cost of building transportation infrastructure among future development in an area. In an UMP, the County calculates the number of new trips that development will produce when a master plan is completely built out and the infrastructure improvements (and costs) that will be required to address those additional trips. The total cost is divided by the number of new trips to arrive at a per-trip cost. Future developers who build in the area pay the per-trip cost based on the number of new trips predicted for their development.

Unified Mobility Programs seek to alleviate the disproportionate costs that developers may incur when they build later than others in a master plan area. Earlier developers may not trigger transportation-related development costs because their development can pass transportation tests in an area (that is not built out), while later developers may fail transportation tests because trips created by their developments are in addition to trips produced by the existing, earlier-built development. The earlier developers would not be subject to costs related to traffic mitigation requirements where the later developers would.

A Unified Mobility Program calculates a per-trip cost at the outset of a new master plan and developers pay the same per-trip based on the number of trips that will result from their new development – regardless of when they build in the life of the master plan.

Planning Department staff report that developers who build in an UMP are not required to undergo a local area transportation review analysis – the UMP fee replaces the requirement to identify, implement, or build traffic mitigation options. Developers that do construct an improvement that is incorporated in the UMP can receive a credit against the UMP fee for the cost of the construction. The next section includes the calculation of a hypothetical UMP fee.

**White Oak Unified Mobility Program.** The 2016-2020 SSP establishes an UMP in White Oak – called the White Oak Local Area Transportation Improvement Program (for simplicity, this report refers to this as the White Oak UMP). Council Resolution, 18-726 on February 14, 2017, set the per trip fee for new development in White Oak at \$5,010 per trip. The anticipated future infrastructure costs in the White Oak UMP include:

|                     |                      |
|---------------------|----------------------|
| Intersections       | \$31,400,000         |
| Transit             | \$15,200,000         |
| Bikeways            | \$42,800,000         |
| New Roads and Other | \$12,400,000         |
| <b>Total</b>        | <b>\$101,800,000</b> |

On September 9, 2017, the Planning Board adopted a schedule setting the number of trips associated with different types of development, summarized in the next table.

**Table 3-1. Trip Generation Rate Schedule for White Oak LATIP, Effective January 1, 2016**

| Land Use               | Trips per Unit of Development | Units             |
|------------------------|-------------------------------|-------------------|
| Office                 | 1.20                          | 1,000 square feet |
| Retail                 | 3.00                          | 1,000 square feet |
| Industrial             | 1.00                          | 1,000 square feet |
| BioScience             | 0.99                          | 1,000 square feet |
| Hospital               | 1.07                          | 1,000 square feet |
| Other Non-residential  | 0.92                          | 1,000 square feet |
| Single Family Detached | 1.28                          | Dwelling Unit     |
| Single Family Attached | 0.65                          | Dwelling Unit     |
| Multi Family Low Rise  | 0.52                          | Dwelling Unit     |
| Multi Family High Rise | 0.34                          | Dwelling Unit     |

Source: LATR Guidelines, Appendix 4

The following example shows the calculation of the fee for a hypothetical developer building a mixed-use development with 50,000 square feet of retail space and 250 apartment units in a high-rise building.

**Table 3-2. Calculation of Hypothetical Unified Mobility Program Fee****Calculation of Trips****Retail Units**

|                                |                       |   |           |
|--------------------------------|-----------------------|---|-----------|
| 50,000 sq. ft. ÷ 1,000 sq. ft. | 50 units x 3.00 trips | = | 150 trips |
|--------------------------------|-----------------------|---|-----------|

**Residential Units**

|                                  |                                 |   |          |
|----------------------------------|---------------------------------|---|----------|
|                                  |                                 | + | +        |
| 250 multi family high rise units | 250 dwelling units x 0.34 trips | = | 85 trips |

|                    |                  |
|--------------------|------------------|
| <b>Total Trips</b> | <b>235 trips</b> |
|--------------------|------------------|

**Calculation of Fee**

|                 |             |
|-----------------|-------------|
| Total Trips     | 235 trips   |
| x Cost per Trip | = x \$5,010 |

|                  |                      |
|------------------|----------------------|
| <b>Total Fee</b> | <b>= \$1,177,350</b> |
|------------------|----------------------|

**White Flint Special Taxing District.** In November 2010, the Council enacted Bill 50-10 creating the White Flint Special Taxing District.<sup>16</sup> The Special Taxing District includes the area in the boundary of the White Flint Metro Station Policy Area as indicated in the 2016-2020 Subdivision Staging Policy, with the exclusion of certain properties.<sup>17</sup> Real property in the Special Taxing District is subject to an additional property tax with the revenue dedicated to pay the cost of building transportation infrastructure in the district.<sup>18</sup>

<sup>16</sup> See MCC § 68C-1, et seq.

<sup>17</sup> MCC § 68C-2.

<sup>18</sup> MCC § 68C-3. Council Resolution 16-1570 identifies the specific projects and associated costs (\$181.7 million) to be financed with revenue from the Special Taxing District. Council Resolution 16-1570, *White Flint Sector Plan Implementation Strategy and Infrastructure Improvement List* (Nov. 30, 2010).

The tax revenue from the special taxing district is intended to generate funding that would otherwise be required under a local area transportation review or come from transportation impact taxes.

Transportation impact taxes in the Special Taxing District are set at \$0 and the Subdivision Staging Policy specifically exempts properties in the Special Taxing District from local area transportation review.<sup>19</sup>

## B. Prince George's County

**Adequate Public Facilities.** Like Montgomery County, Prince George's County has an adequate public facilities ordinance.<sup>20</sup> The Prince George's County Planning Board must "determine that roads that will serve a proposed subdivision be adequate before approving a submitted preliminary plan."<sup>21</sup> Also like Montgomery County, a subdivision developer must perform a traffic impact study to help evaluate the adequacy of transportation facilities if a proposed development will generate 50 or more new trips during any peak hour.<sup>22</sup> Developers in Prince George's County undertake Transportation Impact Studies (TIS) to evaluate the effect of a proposed development on the transportation network (akin to the LATR in Montgomery County).<sup>23</sup>

Where Montgomery County guidelines rank the preferred types of transportation mitigation options (beginning with TDM approaches) if an LATR study indicates inadequate public transportation facilities to support a proposed development. In Prince George's County, a developer can "recommend an improvement, enhancement, or other action that results in adequate [transportation] operations" and "such actions most frequently consist of physical improvements that add transportation system capacity."<sup>24</sup> Developers are responsible for all costs associated with implementing recommended improvements.<sup>25</sup>

Prince George's County law also requires an adequate public facilities determination (and a developer must conduct a TIS) for transportation adequacy for certain rezoning applications (e.g., Comprehensive Design Zones and M-X-T zones).<sup>26</sup> The County, however, does not require a TIS with applications for special exceptions and site plans in most zones.<sup>27</sup>

**Funding transportation improvements necessitated by new development.** Prince George's County also differs from Montgomery County with respect to funding transportation improvements. Where Montgomery County recently approved use of Urban Mobility Programs to spread the cost of transportation improvements among developers in a master plan area, Prince George's County's Transportation Review Guidelines specifically state that funding improvements through "fair share" payments is not allowed under County law.<sup>28</sup>

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<sup>19</sup> MCC § 52-49(b); 2016-2020 SSP, at p. 7.

<sup>20</sup> PGCC § 24-122.01.

<sup>21</sup> *Transportation Review Guidelines, Part I, 2012*, Transportation Planning Section, Prince George's County Planning Department, at p. 20 [hereinafter "*Transportation Review Guidelines*"]; see also PGCC § 24-124(a).

<sup>22</sup> *Transportation Review Guidelines*, at p. 20.

<sup>23</sup> *Ibid.*, at p. 9.

<sup>24</sup> *Ibid.*, at p. 49.

<sup>25</sup> *Ibid.*, at p. 50.

<sup>26</sup> PGCC §§ 27-195(b)(1)(C); 27-213(a)(3).

<sup>27</sup> *Transportation Review Guidelines*, at p. 21.

<sup>28</sup> *Ibid.*, at pp. 50-51.

## C. Fairfax County

**State review of and input on development proposals.** The Virginia Department of Transportation (VDOT) has significant authority over the design and development of roads in local jurisdictions like Fairfax County. In Virginia, many streets built in local jurisdictions (often by developers) are subsequently maintained by VDOT and must meet criteria established in State law and regulations.<sup>29</sup> VDOT regulations require developers who submit a rezoning application to undertake a Traffic Impact Analysis (TIA) if a proposal “substantially affects transportation on state-controlled highways.” The standards for conducting a TIA are established by VDOT.<sup>30</sup>

A Traffic Impact Analysis analyzes how a proposed development will impact traffic. The results from the analysis must include recommended improvements based upon the degree to which the analysis indicates development will impact traffic.<sup>31</sup> Improvements may include changes to, or the addition of, roads or intersections, travel demand management measures, and/or changes to pedestrian and bicycle facilities.<sup>32</sup>

**Funding transportation improvements necessitated by new development.** Fairfax County law allows the Board of Supervisors to establish Pro Rata Reimbursement Districts that allow an “initial subdivider or developer” who built public road improvements to be reimbursed for a portion of the cost of building the improvements by subsequent developers in the area.<sup>33</sup> These districts recognize that some developers will provide road improvements that will benefit future developments in the same area.

The Board of Supervisors establishes Pro Rata Reimbursement Districts based on requests from a developer who has funded transportation infrastructure.<sup>34</sup> The Board of Supervisors can adopt reimbursement rates (1) per vehicle trip and/or (2) per dwelling unit.<sup>35</sup> Subsequent developers are required to make reimbursement payments before the County issues a residential or nonresidential use permit.<sup>36</sup> Districts are valid for 25 years after they are established.<sup>37</sup>

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<sup>29</sup> See Virginia Administrative Code §24 VAC 30-91-20 (“This regulation is intended to govern subdivision street development and the criteria for acceptance of these streets by the [Virginia Department of Transportation] for subsequent maintenance.”); Fairfax County law requires developers to conform to street construction requirements in the County’s Public Facilities Manual, which, in turn, requires conformance with VDOT Subdivision Street Requirements. See FCC § 101-2-2; *Fairfax County Public Facilities Manual* § 7-0101.2. Streets that are not built to these specifications are not eligible for State or local transportation funding and must be privately maintained. FXZO § 17-106(21).

<sup>30</sup> Virginia Administrative Code § 24 VAC 30-155-40(A). VDOT defines “substantially affects” as generating more than 5,000 vehicle trips per day where a development site connects to or is near a state-controlled highway or if generating 400 trips a day on a State-controlled highway. *Ibid.* See also VDOT’s Administrative Guidelines for the Traffic Impact Analysis Regulations.

<sup>31</sup> See *Administrative Guidelines for the Traffic Impact Analysis Regulations*, VDOT, at p 49, 59.

<sup>32</sup> *Ibid.*, at p 49.

<sup>33</sup> See FCC § 101-3-1 et seq.

<sup>34</sup> FCC §§ 101-3-1; 101-3-9.

<sup>35</sup> FCC §§ 101-3-8; 101-3-9.

<sup>36</sup> FCC § 101-3-11(a).

<sup>37</sup> FCC § 101-3-9(h).



## D. District of Columbia

Unlike Montgomery County, which has set out in law (the APFO) when developers must build transportation infrastructure in a development project, the District's requirements are set out in the District Department of Transportation's (DDOT) Design and Engineering Manual ("the Manual"). The DDOT oversees the process developers use to analyze a project's impact on transportation infrastructure and DDOT's Design and Engineering Manual outlines the policies, procedures, and standards for this analysis.<sup>38</sup> Developers are required to mitigate "significant impacts" to transportation that will result from proposed projects and the Manual defines what is considered "significant" (e.g., changes to level of service for roads, impacts on queue length for turn lanes, etc.).<sup>39</sup>

The District's policies give DDOT significant flexibility to determine the scope of a transportation analysis for a project and, like Montgomery County, prioritize preferred transportation improvements. DDOT will only consider proposed increases to roadway capacity as a last resort if other measures cannot adequately address the impacts of a proposed development.<sup>40</sup> DDOT's preferred mitigation efforts include:

- Optimal site design and operations;
- Reducing on-site vehicle parking;
- Transportation demand management measures; and
- Upgrades to pedestrian, bicycle, and transit networks.

DDOT also administers a Transportation Infrastructure Project Review Fund that collects revenue from, among other sources, payments required in orders issued by the Zoning Commission or Board of Zoning Adjustments – often stemming from approvals of private development projects.<sup>41</sup> DDOT can use revenue from the Fund to pay for transportation infrastructure or mitigation measures related to development projects on private property.<sup>42</sup>

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<sup>38</sup> See [https://ddot.dc.gov/sites/default/files/dc/sites/ddot/publication/attachments/2017-06-30\\_DDOT\\_DEM.pdf](https://ddot.dc.gov/sites/default/files/dc/sites/ddot/publication/attachments/2017-06-30_DDOT_DEM.pdf).

<sup>39</sup> *District Department of Transportation Design and Engineering Manual*, § 38.3.5 (2017).

<sup>40</sup> DDOT Comprehensive Transportation Review Scoping Form, at pp. 15-16.

<sup>41</sup> DCC § 50-921.17(b).

<sup>42</sup> DCC § 50-921.17(c).

## Chapter 4. Public Schools

New residential development typically brings new students into a school system. Both Montgomery County and Fairfax County have seen increased school enrollment since 2008, leading to a need for more or larger schools. This chapter summarizes how Montgomery County and other local jurisdictions require residential developers to help fund increased school capacity to offset increased enrollment from new development.

### A. Montgomery County

This section describes Montgomery County’s Adequate Public Facilities Ordinance and Subdivision Staging Policy – the County law and policy that guide planners’ analysis of whether schools have the capacity for additional students that result from new residential construction. It also summarizes recent data on school capacity and its impact on future development and data on school impact tax revenue (see Chapter 2 for a discussion of impact taxes) used to fund the Montgomery County Public Schools’ Capital Improvement Plan.

**Adequate Public Facilities and Schools.** Since 1961, the County has required new residential subdivisions to include certain infrastructure integral to new development – mainly road improvements.<sup>1</sup> In 1973, the County expanded requirements via the Adequate Public Facilities Ordinance (APFO), which prohibits the Planning Board from approving a plan for a new subdivision unless the Board finds that six types of public facilities are adequate to support and serve the proposed subdivision: (1) roads and public transportation; (2) water and sewer; (3) schools; (4) police stations; (5) firehouses; and (6) health clinics.<sup>2</sup>

In 1986, the County enacted legislation outlining procedures that the Council could use to adopt a Subdivision Staging Policy (SSP) – which sets out Council guidance for the Planning Board’s implementation of the APFO. Updated every four years, the SSP seeks to ensure that the County’s infrastructure, particularly schools and transportation, keep pace with new development.<sup>3</sup>

In 1987, the Council established a requirement in the SSP for an annual test of school utilization that measures the ratio of student enrollment to school capacity – to determine if the Planning Board should refrain from approving new development if schools in a particular part of the County are too overcrowded (called a “development moratorium”).<sup>4</sup> Before 2016, planners analyzed school utilization by high school cluster.<sup>5</sup> The Council’s 2016 update of the SSP added an additional evaluation at the individual school level. The update also revised the calculation of the “student generation rate” – the

<sup>1</sup> See County Council staff report *Implementation of the Development District Act: An Analysis of Issues Raised by the Clarksburg Town Center Advisory Committee*.

[https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/doc/report\\_w\\_summ.pdf](https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/doc/report_w_summ.pdf)

<sup>2</sup> MCC § 50-35(k).

<sup>3</sup> MCC § 33A-15; *Subdivision Staging Policy FAQs*, available at <http://montgomeryplanning.org/planning/functional-planning/subdivision-staging-policy/2016-subdivision-staging-policy/subdivision-staging-policy-faqs/>.

<sup>4</sup> Ibid.

<sup>5</sup> A cluster is a geographically defined attendance area for the elementary and middle schools that feed into a high school or group of high schools.

number of students generated by a particular type of housing (e.g., single family, townhouse, garden-style apartment, high-rise apartment) that the Planning Board uses to estimate the impact of new development on school enrollment.

**Testing School Adequacy.** The test for the adequacy of school capacity outlined in the SSP is conducted each year using school construction data from the capital budget adopted by the County Council in May and school enrollment projections by MCPS from the previous October. If a school cluster or individual school exceeds certain thresholds, the area that feeds into the school(s) (delineated by MCPS' school and cluster boundaries) will be placed under a development moratorium, a temporary halt to residential development projects in a particular area to reduce school overcrowding.<sup>6</sup> The capacity thresholds in the SSP are:

**School Cluster Threshold:** An entire cluster service area is placed in moratorium if any school level (elementary, middle or high) is projected to exceed 120% capacity utilization cumulatively across the cluster five years in the future.

**Individual School Threshold:** An individual school service area is placed in moratorium if the school's projected utilization (capacity to enrollment ratio) five years in the future exceeds 120% *and* if the school is over capacity by at least 110 students (elementary) or 180 students (middle). There is no individual school test at the high school level because the test for school cluster threshold measures capacity at the high school level.<sup>7</sup>

The data below show an example of how the two thresholds are calculated: (1) by looking at the difference between school capacity and school enrollment for individual schools and (2) by looking at the ratio of school enrollment to school capacity (called the Utilization Rate).

| Test #1         |            |            | Test #2                   |  |
|-----------------|------------|------------|---------------------------|--|
| School Capacity | Enrollment | Difference | Utilization Rate          |  |
| 1,000           | - 1,250    | = - 250    | 1,250/1,000 = 1.25 = 125% |  |

School capacity includes both current school capacities plus capacity funded in the six-year capital improvements program (e.g., new schools, additions to existing schools). To avoid development moratoriums, the County Council often creates placeholder projects in the capital improvements program that would create additional school capacity to satisfy the APFO and SSP. The Council approves placeholder projects when all the following conditions are met:

1. A cluster or school service area is projected to exceed the moratorium threshold;
2. MCPS is concurrently—or about to start—planning for a capital project that would address the potential moratorium; and
3. MCPS's normal schedule for planning, design, and construction would have the project's added capacity opening by the start of the school year five years hence.<sup>8</sup>

<sup>6</sup> 2016-2020 SSP, at p. 12.

<sup>7</sup> *Subdivision Staging Policy FAQs*.

<sup>8</sup> *Placeholders, Indeed, Do Have a Place in the MCPS Capital Budget*, by Glenn Orlin, Deputy Director of the County Council, May 2, 2018, available at <http://www.theseventhstate.com/?p=10303>

The Planning Board's FY19 school capacity analysis indicates that five elementary schools and two high schools exceed the capacity thresholds and are in moratorium. In addition, four placeholder projects were included in the FY19 CIP to avoid either clusters or school areas being placed in moratorium. The next table summarizes these data.

**Table 4-1. Summary of FY19 School Capacity Analysis**

| <b>School</b>                                    | <b>Difference<br/>in Capacity</b> | <b>Utilization<br/>Rate</b> | <b>Placeholder<br/>Project</b> |
|--|-----------------------------------|-----------------------------|--------------------------------|
| <b>School Clusters in Moratorium</b>             |                                   |                             |                                |
| Montgomery Blair Cluster                         |                                   | 123.8%                      |                                |
| Northwood Cluster                                |                                   | 141.2%                      |                                |
| <b>School Service Areas in Moratorium</b>        |                                   |                             |                                |
| Ashburton ES                                     | -173                              | 122.5%                      |                                |
| Burnt Mills ES                                   | -183                              | 146.7%                      |                                |
| Highland View ES                                 | -122                              | 142.4%                      |                                |
| Lake Seneca ES                                   | -120                              | 130.4%                      |                                |
| Stonegate ES                                     | -151                              | 140.6%                      |                                |
| <b>School Cluster Placeholder Projects</b>       |                                   |                             |                                |
| Albert Einstein Cluster                          |                                   |                             | 14 classrooms                  |
| <b>School Service Areas Placeholder Projects</b> |                                   |                             |                                |
| Bethesda ES                                      |                                   |                             | 6 classrooms                   |
| Judith A. Resnik ES                              |                                   |                             | 4 classrooms                   |
| Somerset ES                                      |                                   |                             | 4 classrooms                   |

Source: Planning Board FY19 Annual School Test Results, available at  
<http://montgomeryplanning.org/wp-content/uploads/2018/06/FY2019AnnualSchoolTest.pdf>

**Funding MCPS Capacity Projects.** As discussed in Chapter 2, school impact taxes paid by residential developers can be used to fund new schools, additions to schools, or school revitalizations/expansions in MCPS. Developers can limit or negate school impact taxes through impact tax credits, given when a developer provides: school planning design, acquisition of land, site improvements, utility relocation, construction, and/or initial furniture and equipment for (1) any new public school, (2) any addition to a public school that adds at least one teaching station, or (3) any public school modernization that adds at least one teaching station.<sup>9</sup> To receive a school impact tax credit, the Board of Education must agree with a developer's proposal and the developer must enter into an agreement with the Department of Permitting Services before any building permit is issued.

According to MCPS, OMB, and DGS, no developers have ever requested or received a school impact tax credit. Representatives from the Montgomery County Planning Board indicate that, typically, residential development projects in the County have not been large enough to justify/support land or school-related construction. A recent approval to redevelop the WMAL property in North Bethesda, however, includes dedication of 4.3 acres for a potential school site (this approved project is in state appeals court

<sup>9</sup> MCC § 52-58.

regarding the developer's request to cut down tree and clear forest area).<sup>10</sup> Dedication of land for a school would allow the developer to request a credit for school impact taxes.

Overall, school impact taxes will fund \$240.5 million (13.5%) of MCPS' \$1.7 billion capital program in FY19-24 – making up slightly more than one out of every eight dollars spent on school capital projects.

**Table 4-2. Funding Sources for MCPS's Approved FY19-24 Capital Improvements Program**  
(\$ in millions)

| <b>Funding Source</b>       | <b>Funding Programmed</b> | <b>% of Total</b> |
|-----------------------------|---------------------------|-------------------|
| Government Obligation Bonds | \$664.3                   | 37.4%             |
| Recordation Tax             | \$385.0                   | 21.7%             |
| State Aid                   | \$355.7                   | 20.0%             |
| School Impact Tax           | \$240.5                   | 13.5%             |
| Current Revenue             | \$132.0                   | 7.4%              |
| School Facilities Payment   | \$0.0                     | 0.0%              |
| <b>Total</b>                | <b>\$1,744.5</b>          | <b>100.0%</b>     |

Source: FY19 Approved Capital Budget and FY19-24 Capital Improvements Plan

In the approved FY19-24 CIP, MCPS has distributed the impact taxes between a new Clarksburg Cluster Elementary School, an addition to S. Crista McAuliffe Elementary School, and Current Revitalizations/Expansions (subprojects at Seneca Valley and Wheaton High Schools). All the projects/subprojects increase school capacity.

**Table 4-3. Projects & Subprojects Funded with School Impact Taxes, FY19-24 (\$ in millions)**

| <b>Project</b>                   | <b>Funding</b> | <b>% of Project</b> |
|----------------------------------|----------------|---------------------|
| Clarksburg Cluster ES            | \$13.9         | 46.8%               |
| S. Christa McAuliffe ES Addition | \$2.9          | 57.1%               |
| Seneca Valley HS*                | \$8.9          | 6.7%                |
| Wheaton HS*                      | \$4.0          | 10.1%               |
| MCPS Funding Reconciliation**    | \$210.9        | N/A                 |
| <b>Total</b>                     | <b>\$240.5</b> | <b>N/A</b>          |

\*Subprojects for the Current Revitalization/Expansion Project

\*\*Placeholder project which reflected current estimates for School Impact Tax, offset by General Obligation Bonds. The School Impact Tax will be allocated to impact tax-eligible projects throughout FY19, substituting for General Obligation Bonds.

Source: FY19 Approved Capital Budget and FY19-24 Capital Improvements Plan

<sup>10</sup> Bethesda Neighbors Appeal Judge's Ruling in Case Contesting WMAL Site Development Plan, by Bethany Rodgers, Bethesda Beat, August 17, 2018, available at <https://bethesdamagazine.com/bethesda-beat/development/bethesda-neighbors-appeal-judges-ruling-in-case-contesting-wmal-site-development-plan/>

## B. Prince George's County

Prince George's County also has a school impact "surcharge" for new residential construction that functions in the same way as Montgomery County's school impact tax. Prince George's County's school facilities surcharge is the same for all types of dwelling units (Montgomery County's impact tax differs for different types of dwelling units – e.g., single family homes, townhouses) and differs based on the location of the new residential construction – inside the capital beltway (Interstate 495) /near mass transit<sup>11</sup> or outside of the capital beltway.<sup>12</sup> As of July 1, 2018, Prince George's school surcharge is \$9,550/unit inside the capital beltway or near mass transit and \$16,371/unit outside of the capital beltway.<sup>13</sup>

The revenue collected from the surcharge is used to supplement existing school facilities' funding and it is used to pay for:

- Additional or expanded public school facilities (renovations or other systemic changes); and
- Debt service payments for additional, expanded, or new school facilities.<sup>14</sup>

However, Prince George's County Council recently has argued that the school impact surcharge should be waived to help increase development – especially for areas with vacant buildings. In September of 2018, the County Council passed a bill that would waive the school facilities surcharge for multifamily development projects within the capital beltway, near mass transit, or in some locations near major roadways.<sup>15</sup> The County Executive vetoed the bill, stating that the Maryland General Assembly – not the County Council – has the authority to impose or waive taxes.<sup>16</sup> The Council overrode the Executive's veto and has sought an opinion from the Maryland Attorney General on the legality of the bill.<sup>17</sup>

## C. Fairfax County

To help fund additional school capacity, Fairfax relies on proffer contributions from residential developers for school construction projects. This section summarizes how Fairfax County ensures school capacity through the Comprehensive Plan and how the County calculates the impact of new development on school enrollment. It also explains Fairfax County's methodology for calculating proffers related to school construction and summarizes recent data on school proffer funding.

<sup>11</sup> Residential development that borders an existing or planned Washington Metropolitan Area Transit Authority rail station site.

<sup>12</sup> PGCC § 10-192.01.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> CB-6-2018, School Facilities Surcharge, approved September 18, 2018.

<https://princegeorgescountymd.legistar.com/LegislationDetail.aspx?ID=3479173&GUID=2E79879F-090B-4206-A68B-AADA7217E479>

<sup>16</sup> Rachel Chason, "In Prince George's, a battle over whether developers fund school construction," *The Washington Post*, October 15, 2018. [https://www.washingtonpost.com/local/md-politics/in-prince-georges-a-battle-over-whether-developers-must-fund-school-construction/2018/10/15/9865195e-c742-11e8-b1ed-1d2d65b86d0c\\_story.html?noredirect=on&utm\\_term=.fcc5734ef548](https://www.washingtonpost.com/local/md-politics/in-prince-georges-a-battle-over-whether-developers-must-fund-school-construction/2018/10/15/9865195e-c742-11e8-b1ed-1d2d65b86d0c_story.html?noredirect=on&utm_term=.fcc5734ef548)

<sup>17</sup> Ibid.

**Comprehensive Plan and Schools.** The Public Facilities Element of the Comprehensive Plan recognizes that the level of public services enjoyed by County residents – including schools – is a significant local attribute and its continuation requires sound and supportable planning guidelines.<sup>18</sup> The Public Facilities Element provides guidance for land use decisions related to public facilities, including:

- The appropriate general location of new facilities;
- Criteria such as size, access, and screening for different facility types;
- Service level standards to evaluate the number of new facilities needed;
- Methods to evaluate the need for and timing of the development of new facilities; and
- The acceptable character and extent of facilities and measures for attaining them.<sup>19</sup>

Fairfax County's Department of Planning and Zoning reviews development applications to assess a development's impact on public facilities – the 2232 Review. For schools, Fairfax uses a methodology recommended by the School Board and approved by the Board of Supervisors to determine the impact of new development on the generation of additional students.<sup>20</sup>

**Developer Funding for Schools.** Like MCPS, Fairfax County Public Schools has seen considerable growth in annual student enrollment since 2008 – ranging from a high of over 3,000 new students a year from 2008 to 2013 to a low of 240 new students in 2015.<sup>21</sup> Fairfax County receives funds from private developers for public school construction through proffers – as part of a developer's request to rezone a parcel of land. As described in Chapter 1, proffers are things – cash, in-kind goods, land, etc. – that developers voluntarily offer to the County as part of the rezoning process.

Fairfax County has developed a methodology to calculate how different types of residential development increase school enrollment and the per-student cost of development – resulting in a dollar amount that is a per-student suggested proffer contribution. The formula incorporates the following variables and is updated periodically to reflect changes in the variables:

- Current construction costs;
- Square feet for each type of school (i.e., elementary, middle, high school);
- Student capacity for each type of school;
- Modular construction costs;
- Average age of buildings; and
- Life expectancy of buildings.<sup>22</sup>

The current recommended per-student proffer contribution is \$12,262. The next table illustrates the calculation of a suggested proffer contribution.

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<sup>18</sup> *Fairfax County Comprehensive Plan*, Public Facilities, 2017 Edition.

<sup>19</sup> Ibid.

<sup>20</sup> *Fairfax County Comprehensive Plan*, Land Use, 2017 Edition, at p. 28.

<sup>21</sup> Fairfax County Public Schools Adopted FY19-23 Capital Improvement Program, at p. 10 [hereinafter "FCPS FY19-23 CIP"]. [https://www.fcps.edu/sites/default/files/media/pdf/Adopted%20FY%202019-23%20CIP\\_0.pdf](https://www.fcps.edu/sites/default/files/media/pdf/Adopted%20FY%202019-23%20CIP_0.pdf)

<sup>22</sup> School Impact Proffer Formula and Student Yield Ratio Update, October 13, 2016.

<https://www.fcps.edu/sites/default/files/media/pdf/School%20Impact%20Proffer%20Formula%20and%20Student%20Yield%20Ratio%20Update%20%28October%202016%29.pdf> A 2015 FCPS document summarizes the proffer formula and explains the methodology. [https://www.fcps.edu/sites/default/files/media/pdf/attachmenc\\_0.pdf](https://www.fcps.edu/sites/default/files/media/pdf/attachmenc_0.pdf)

**Table 4-4. Example Calculation of Suggested Proffer Contribution for Fairfax County School Funding**

|  |  |          |   |          |                                       |
|--|--|----------|---|----------|---------------------------------------|
| <b>Step 1</b>  |  |          |   |          |                                       |
| Estimate Number of Additional Students                           | <b># of Single-Family Detached Units</b> | <b>x</b> | <b>Student Yield for Unit Type</b>                | <b>=</b> | <b>Estimated # of New Students</b>    |
|  | 10 units                                 | x        | 0.533 students                                    | =        | 5.3 new students                      |
| <b>Step 2</b>  |  |          |   |          |                                       |
| Account for Existing Students in Rezoning Area                   | <b>Estimated # of New Students</b>       | <b>–</b> | <b>Existing Students</b>                          | <b>=</b> | <b>Adjusted # of New Students</b>     |
|  | 5.3 new students                         | –        | 0   | =        | 5.3 students                          |
| <b>Step 3</b>  |  |          |   |          |                                       |
| Multiply Number of New Students by Suggested Per-Student Proffer | <b>Adjusted # of New Students</b>        | <b>x</b> | <b>Suggested Per-Student Proffer Contribution</b> | <b>=</b> | <b>Suggested Proffer Contribution</b> |
|  | 5.3 new students                         | x        | \$12,262  | =        | <b>\$64,989</b>                       |

A proffer contribution is officially set when the County approves a rezoning application.

**Funding FCPS Capacity Projects.** Proffered funds for school construction can be used for new primary and secondary public schools or expansion of existing primary and secondary public schools – including all buildings, structures, parking, and other directly related costs.<sup>23</sup> They are the primary exaction received by Fairfax County to provide funding for additional public school capacity.

#### **D. District of Columbia**

The District of Columbia Comprehensive Plan is the City’s framework for guiding growth and development.<sup>24</sup> Last updated in 2011, the Comprehensive Plan includes an Educational Facilities element that “addresses the location, planning, use and design of the District’s educational facilities and campuses.”<sup>25</sup> In the section of the Comprehensive Plan addressing educational facilities, the plan lists an action item to establish a mechanism for developer proffers to meet school facility needs.<sup>26</sup> According to a representative from the District’s Office of Planning, the District is still currently working on creating this mechanism.

#### **E. School-Related Impact Taxes/Fees for Certain Maryland and Virginia Counties**

The Montgomery County Planning Department recently compiled data on FY19 school-related impact taxes/fees for nine local jurisdictions, including Montgomery County, Prince George’s County, and Fairfax County. The District of Columbia does not have a school-related per-unit tax or fee for development. The next table compares these data. Each line represents the range of impact taxes/fees in each jurisdiction – with the higher value representing the tax/fee for a residential single-family unit and the lower value representing the tax/fee for a residential multifamily unit.

<sup>23</sup> VA Code § 15.2-2303.4.A.

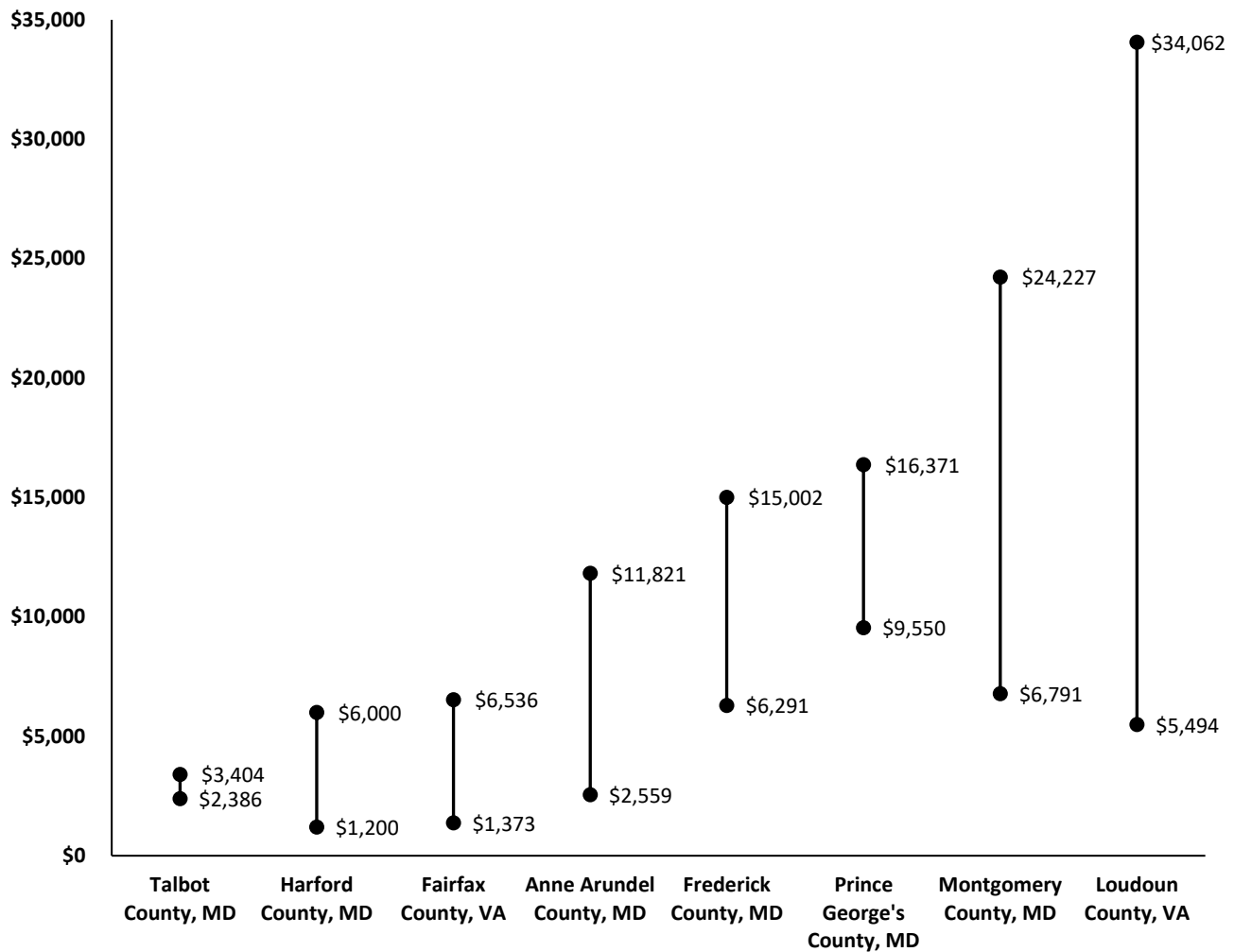
<sup>24</sup> See <https://planning.dc.gov/page/comprehensive-plan> for information about the Plan.

<sup>25</sup> *The Comprehensive Plan for the National Capital*, Volume I, Chapter 12, Educational Facilities Element, Page 12-1 [hereinafter “*District Comprehensive Plan*”].

<sup>26</sup> *District Comprehensive Plan*, Volume 3, Implementation Element, at p. 25-70.



**Exhibit 4-1. FY19 School Impact Tax/Fee Ranges, per Dwelling Unit**



Note: Higher values represent the tax/fee per single family unit; the lower values represent the tax/fee per multifamily unit.

Source: Montgomery County Planning Department & County Websites

## Chapter 5. Water and Sewer Infrastructure

Building or increasing the capacity of water and sewer services are necessary components of new development. This chapter summarizes water and sewer requirements for development in Montgomery County and other local jurisdictions.

### A. Montgomery County

The Washington Suburban Sanitary Commission (WSSC) is responsible “for the design, construction, operation, and maintenance of the community water supply and sewerage systems” in the Washington Suburban Sanitary District (“sanitary district”), which includes most of Montgomery and Prince George’s Counties.<sup>1</sup> WSSC, a bi-county commission established under State law in 1918, oversees water mains, pumping stations, water storage facilities, water supply reservoirs, filtration plants, sewer lines, and wastewater treatment facilities.<sup>2</sup>

Water and sewer facilities are included in the analysis of whether a proposed development will be served by adequate public facilities. WSSC assesses the adequacy of public water and sewer infrastructure for a proposed development through a “hydraulic planning analysis” – a WSSC evaluation of “the impact of the proposed development on existing water and sewer systems [that] determines needed infrastructure and facilities to serve the proposed ... development....”<sup>3</sup>

The remainder of this section describes the responsibility of private developers who seek to extend and/or connect WSSC’s water and sewer systems to buildings in development or redevelopment projects. Project construction and financing in these projects is primarily the responsibility of the developer or land owner and these projects usually differ from WSSC-initiated capital projects. For ease of understanding, this chapter generally uses the term “developer” to refer to an applicant seeking to connect to WSSC’s water and sewer systems.

When building a residential, commercial, or industrial development in the sanitary district, the developer is required to build and pay for all water and sewer lines for the development to connect to WSSC’s system.<sup>4</sup> State law requires developers to submit water and sewer line plans for WSSC approval before constructing the lines and allows WSSC to inspect the lines before they are connected to WSSC’s systems.<sup>5</sup> WSSC’s 2018 Development Services Code outlines requirements for developers and property owners proposing development in the sanitary district (described in more detail below).<sup>6</sup>

WSSC’s Development Services Code divides projects into two categories – those that require an extension of WSSC’s existing water and sewer system and those that only require a water and sewer connection (tap) to existing WSSC infrastructure.

<sup>1</sup> *Montgomery County Comprehensive Water Supply and Sewerage Systems Plan: Approved 2003-2012 Plan*, p. 1-6 [hereinafter “*Water and Sewer Plan*”]. See also MD Code Ann. – Public Utilities, § 23-101.

<sup>2</sup> *Water and Sewer Plan*, p. 1-6.

<sup>3</sup> WSSC 2018 Development Services Code, § 401.1 [hereinafter “WSSC Code”].

<sup>4</sup> MD Code Ann. – Public Utilities, § 23-201(c); WSSC Code, § 501.2.

<sup>5</sup> MD Code Ann. – Public Utilities, § 23-201(d).

<sup>6</sup> Available at: <https://www.wsscwater.com/files/live/sites/wssc/files/Development%20Services/11-%202018%20DS%20CODE%20FINAL%20Draft-3.pdf>.

**Table 5-1. WSSC Water and Sewer Project Categories**

| <b>Project Category</b>        | <b>Description</b>  |
|--------------------------------|---|
| System Extension Process (SEP) | Projects requiring extension of existing WSSC-owned water or sewer lines  |
| Site Utility Projects          | <p>Projects requiring connection of water and sewer infrastructure on private property to existing WSSC-owned water and sewer lines</p> <p><b>Standard Site Utility:</b> if water service pipes 4" or more in diameter, building sewer pipes 6" or more in diameter, or non-residential pressure sewer system</p> <p><b>Minor Site Utility:</b> if water service pipes 4" or more in diameter, building sewer pipes 6" or more in diameter, or non-residential pressure sewer system; and where the length of on-property water service or building sewer lines are 25' or less, no new or abandoned service connections are proposed, and where authorized by WSSC</p> <p><b>Smaller Projects:</b> subject to WSSC plumbing permit processes</p> |

In SEP projects, ownership of the infrastructure built for the project transfers to WSSC. In Site Utility projects, the land-owner retains ownership and responsibility for the infrastructure built on private property.

**Legal Ability to Connect to WSSC's Systems.** Pursuant to State law, Montgomery County maintains a comprehensive plan outlining water and sewer system needs.<sup>7</sup> It is a functional plan – created and administered by the County Department of Environmental Protection (DEP) and adopted by the Council – used to guide County water and sewer service expansion based on the broad development visions outlined in County master plans.<sup>8</sup> The most recent plan is the *Montgomery County Comprehensive Water Supply and Sewerage Systems Plan: Approved 2003-2012 Plan*.<sup>9</sup>

As described in the next table, the *Water and Sewer Plan* divides all areas of the County into five service area categories, with four areas designated for public water and sewer and one designated for well and septic systems (individual systems) as their sources of water and sewage disposal.<sup>10</sup>

<sup>7</sup> MD Code Ann. – Environment, § 9-503(a). State law requires the plan to span at least ten years in the future and for the Council to revise the plan at least every three years. Ibid. §§ 9-503(a); 9-515(b). On October 2, 2018, the Council adopted a resolution to approve the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan 2018-2027. Following this approval and a 10-day review period by the County Executive, Montgomery County will send the plan to the Maryland Department of the Environment (MDE) for final approval. MDE has 60 days from receipt of the Plan to approve or deny it. Upon notice to the County, MDE can extend the review period an additional 45 days. If MDE has not acted at the conclusion of the review period, the Plan is approved by default as adopted by the Council.

<sup>8</sup> *Water and Sewer Plan*, pp.1-1, 1-3. DEP drafts the Water and Sewer Plan with input from WSSC, M-NCPPC, the District of Columbia Water and Sewer Authority, City of Rockville, Town of Poolesville, Maryland Department of the Environment, and Maryland Department of Planning. Transportation, Infrastructure, Energy & Environment (T&E) Committee Packet, Item #4, July 20, 2017, at ©5.

<sup>9</sup> [http://montgomerycountymd.granicus.com/MetaViewer.php?view\\_id=169&clip\\_id=13602&meta\\_id=141802](http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=169&clip_id=13602&meta_id=141802)

<sup>9</sup> <https://www.montgomerycountymd.gov/water/supply/county-water-plan.html#waterplan>

<sup>10</sup> See *Water and Sewer Plan*, p. 1-11 to 1-12.

**Table 5-2. Development Timeframes for Public Water and Sewer in Montgomery County *Water and Sewer Plan***

| <b>Service Area Category</b> | <b>Development Timeframe for Public Water and Sewer</b> |
|------------------------------|---|
| W-1 and S-1                  | Existing or under construction                          |
| W-2 and S-2                  | Not used in Montgomery County                           |
| W-3 and S-3                  | 2 years or as development is planned and scheduled      |
| W-4 and S-4                  | 3-6 years   |
| W-5 and S-5                  | 7-10 years  |
| W-6 and S-6                  | No planned public system within 10 years                |

Source: *Water and Sewer Plan*

WSSC is prohibited by State law from extending its water and sewer system to areas of the County not planned for public water and sewer service.<sup>11</sup> To connect to WSSC's water and sewer systems, a parcel of land must be in categories W-1/S-1 or W-3/S-3. Developed land in categories W-4/S-4 through W-6/S-6 can install individual well and septic systems, or a property owner can request a category change to categories W-1/S-1 or W-3/S-3 to connect to WSSC's systems.<sup>12</sup> If a developer is subdividing land and requires a category change, the developer must request the category change before the Planning Department will accept an application for a preliminary plan of subdivision.<sup>13</sup>

Requests for water and sewer category changes are considered amendments to the *Water and Sewer Plan* and require County Council action.<sup>14</sup> The Council has delegated authority to DEP to administratively review and approve certain category change requests while the Council reviews and takes action on others. DEP maintains a website outlining the process for requesting a category change that explains the administrative and Council processes.<sup>15</sup>

Once each quarter, DEP distributes category change requests to DPS, M-NCPPC, and WSSC for review and comment. In FY18, DEP received a total of 11 category change requests. DEP representatives estimate that completing the process for a category change request takes from 3-6 months, depending on the complexity of the case.

**Project Development, Design, and Construction.** WSSC has a multi-phase process for the development and construction of water and sewer projects by private developers. Developers must receive WSSC's approval to construct and build new water and sewer infrastructure that will connect to WSSC's system. Developers are required to pay for project development costs and infrastructure construction costs.<sup>16</sup> In

<sup>11</sup> WSSC Code § 405.2; WSSC Water & Sewer Authorization Manual, Ch. 1(H)(1).

<https://www.wsscwater.com/business--construction/developmentconstruction-services/development-process-manuals/water--sewer-authorization-manua.html>

<sup>12</sup> *Water and Sewer Plan*, pp. 1-5, 1-11 to 1-14

<sup>13</sup> *Preliminary Plan: Application Upload Checklist and Submission Requirements*, Montgomery County Planning Department, at p. 6 [hereinafter "*Preliminary Plan Submission Requirements*"].

<http://montgomeryplanning.org/wp-content/uploads/2017/11/Preliminary-Plan-Upload-Checklist-Submission-Requirements-2017-12-6-2.pdf>

<sup>14</sup> See <https://www.montgomerycountymd.gov/waterworks> for detailed information about service area category changes.

<sup>15</sup> [www.montgomerycountymd.gov/waterworks](http://www.montgomerycountymd.gov/waterworks)

<sup>16</sup> See MD Code Ann. – Public Utilities, § 23-201(c); WSSC Code, § 501.2.

System Extension Process projects, developers may have some options for reimbursement for certain costs (see System Development Charges below).<sup>17</sup>

WSSC reports the dollar amount of depreciable infrastructure constructed and contributed by developers in a given year in its annual financial statements. The next table summarizes these data.

**Table 5-3. Value of Depreciable Infrastructure  
Constructed and Contributed by Developers (\$ in millions)**

| Fiscal Year | House<br>Connections | Water and<br>Sewer Mains |
|-------------|----------------------|--------------------------|
| FY14        | \$4.7                | \$32.8                   |
| FY15        | \$6.5                | \$33.4                   |
| FY16        | \$5.6                | \$28.0                   |
| FY17        | \$4.8                | \$29.0                   |
| FY18        | \$6.7                | \$24.3                   |

Source: WSSC annual financial statements

**System Development Charges.** In 1993, the State enacted a law allowing WSSC to collect a system development charge (SDC), which is “a dedicated stream of revenues used to accommodate increased system demand from new development by funding capacity improvements.”<sup>18</sup> Developers pay the SDC based on the number of plumbing fixtures in a commercial property or per toilet for residential properties.<sup>19</sup>

SDC funds can only be used for the construction of new treatment, transmission, and collection facilities attributable to new development resulting in new WSSC service.<sup>20</sup> Applicants for new or expanded WSSC service pay the SDC for:

- Connecting a property to the WSSC water or sewer system for the first time;
- Increasing water meter size, connection size, or adding a new connection for a property previously or currently served by WSSC; or
- Increasing the number of fixtures on properties previously subject to a SDC (in some situations).<sup>21</sup>

In Montgomery County, the following types of properties are fully or partially exempt from the SDC:

- Affordable housing;
- Revitalization projects;
- Residential property in planned retirement communities;

<sup>17</sup> See MD Code Ann. – Public Utilities, § 25-403.

<sup>18</sup> Ibid., § 25-401 et seq.; “Overview of System Development Charges,” WSSC PowerPoint, January 8, 2014, p. 3. [https://www.wsscwater.com/files/live/sites/wssc/files/PDFs/WSSC%20CFO's%20Presentation%20on%20System%20Development%20Charges%20January%208%202014\\_250411.pdf](https://www.wsscwater.com/files/live/sites/wssc/files/PDFs/WSSC%20CFO's%20Presentation%20on%20System%20Development%20Charges%20January%208%202014_250411.pdf)

<sup>19</sup> MD Code Ann. – Public Utilities, § 25-403(a).

<sup>20</sup> See Ibid., § 25-401 et seq.

<sup>21</sup> “Overview of System Development Charges,” p. 3.

- Other types of elderly housing; and
- Properties for manufacturing or biotechnology research and development.<sup>22</sup>

Developers can receive a credit against an SDC for a project if the developer constructs (1) a facility in WSSC's capital improvements program (CIP) and in the County's Water and Sewer Plan, (2) a major project in WSSC's CIP, or (3) certain larger water or sewer mains.<sup>23</sup> The credit is limited to the amount of the larger water or sewer mains in a project.<sup>24</sup> The County Councils in Montgomery County and Prince George's County jointly set SDC rates. The next table includes examples of current SDC charges.<sup>25</sup>

**Table 5-4. Partial List of Current System Development Charge Rates**

|  | SDC Water Charge | SDC Sewer Charge | SDC Total Charge |
|--|------------------|------------------|------------------|
| <b>Residential</b>                         |                  |                  |                  |
| Bathtub                                    | \$264            | \$184            | \$448            |
| Dishwasher                                 | \$88             | \$184            | \$272            |
| Lawn Sprinkler (1" or larger water supply) | \$880            |                  | \$880            |
| Sink – Kitchen                             | \$176            | \$184            | \$360            |
| Sink – Lavatory                            | \$88             | \$104            | \$192            |
| <b>Non-Residential</b>                     |                  |                  |                  |
| Bathtub                                    | \$880            | \$230            | \$1,110          |
| Dishwasher – Commercial                    | \$176            | \$460            | \$636            |
| Drinking Fountain                          | \$22             | \$58             | \$80             |
| Emergency Shower                           | \$330            |                  | \$330            |
| Irrigation System (1" water supply)        | \$6,600          |                  | \$6,600          |
| Receptor Drain – 2"                        |                  | \$345            | \$345            |
| Shower Stall – 2" drain                    | \$440            | \$345            | \$785            |
| Sink – Hand                                | \$88             | \$115            | \$203            |
| Sink – Mop or Service (2" trap)            | \$176            | \$345            | \$521            |

Source: 2018 WSSC Plumbing & Fuel Gas Code, effective July 1, 2018

The next table summarizes revenue from system development charges collected by WSSC in past years.

**Table 5-5. Revenue from WSSC's System Development Charge (\$ in millions)**

| Fiscal Year           | FY14   | FY15   | FY16   | FY17   | FY18   |
|-----------------------|--------|--------|--------|--------|--------|
| SDC Charges Collected | \$27.9 | \$25.9 | \$27.7 | \$28.9 | \$28.4 |

Source: WSSC annual financial statements

<sup>22</sup> MD Code Ann. – Public Utilities, § 25-403(b); "Overview of System Development Charges," p. 6.

<sup>23</sup> MD Code Ann. – Public Utilities, § 25-405.

<sup>24</sup> Ibid., § 25-405(c); SP-REG-IFSM-EC-2016-004

<sup>25</sup> Current SDC charges are found in the appendix of the WSSC's Plumbing & Fuel Gas Code. See 2018 WSSC Plumbing & Fuel Gas Code, pp. 207-211.

<https://www.wsscwater.com/files/live/sites/wssc/files/PlumbersInfo/2018%20Code%20Doc%20-%20Final.pdf>

## **B. Prince George's County**

As previously noted, the Washington Suburban Sanitary Commission (WSSC) also oversees water and sewer systems in Prince George's County. Like Montgomery County, Prince George's County follows Maryland State law and maintains a Water and Sewer Plan (developed by the County's Department of Environmental Resources) that guides County planning and development processes regarding both public and private water and sewer services.<sup>26</sup> Prince George's County also follows the same WSSC requirements for project development, design, and construction as Montgomery County.<sup>27</sup>

There are a few notable differences between the two counties, even though both are overseen by WSSC. For example, Prince George's County only uses four service area categories for water and sewer. Categories one, two, and three in Montgomery County are combined into one category in Prince George's County; categories four, five, and six are the same as in Montgomery County.

In addition, the County Councils for Prince George's and Montgomery Counties jointly set WSSC System Development Charges (SDC).<sup>28</sup> Montgomery County provides exemptions from SDCs for certain biotechnology, elderly housing, and revitalization projects. Because the Council limits annual funding for exemptions, the County caps the SDC exemption for an individual project at \$50,000 to benefit as many projects as possible.<sup>29</sup> Prince George's County does not cap exemptions for individual projects.

## **C. Fairfax County**

Fairfax County has separate providers for water and sewer services. Fairfax Water (a nonprofit, public utility) is the main water services provider. Fairfax County's Department of Public Works and Environmental Services provides the sewer services.

For water main extensions in a new residential, commercial, or industrial development, the developer is responsible for all facilities necessary (i.e., water mains, valves, fire hydrants, etc.).<sup>30</sup> However, Fairfax Water will cover the costs for three different situations:

1. If Fairfax Water desires to install a larger size water main or other facility that a developer is not required to build for the provision of adequate service;
2. Fire hydrants on off-site water main extensions that will be used for future homes; and

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<sup>26</sup> Prince George's County Water and Sewer Plan, Page 1-1, available at <https://www.princegeorgescountymd.gov/DocumentCenter/View/20556/Adopted-2008-Water-Sewer-Plan-Manual-PDF?bidId=>

<sup>27</sup> See MD Code Ann. – Public Utilities, § 25-401

<sup>28</sup> Ibid., § 25-403; Montgomery County Council Resolution 18-1133, System Development Charge Modification, available at [https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/res/2018/20180516\\_18-1133.pdf](https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/res/2018/20180516_18-1133.pdf)

<sup>29</sup> Exemption to the System Development Charge, Department of Permitting Services, available at <https://permittingservices.montgomerycountymd.gov/DPS/pdf/ExemptiontotheSystemsDevelopmentCharge.pdf>

<sup>30</sup> Design Practice Manual – Distribution System, Planning and Engineering Division of Fairfax County Water Authority, available at [https://www.fairfaxwater.org/sites/default/files/developers\\_engineers/DESIGN-PRACT3-00update.pdf](https://www.fairfaxwater.org/sites/default/files/developers_engineers/DESIGN-PRACT3-00update.pdf).

3. When a developer must connect to an existing water main that does not have adequate capacity to serve the new development.<sup>31</sup>

Fairfax's Department of Public Works, Office of Waste Management, provides the public sewer service for most of Fairfax County.<sup>32</sup> Similar to water main extensions for new residential, commercial, or industrial development, "any extension of [the] public sewer shall be made at the expense of the owner [developer] on the premises to be served."<sup>33</sup>

Like Montgomery County's System Development Charge, Fairfax County has one-time charges for providing sewer services to a dwelling unit. They include:

- **Availability Charge** – collected prior to the connection to system to cover in part the applicant's proportional share of the cost of facilities required beyond the collector system;
- **Connection Charge** – collected prior to connection to the system in those cases where service can be obtained from facilities provided by and at the expense of the County, or persons, firms, or corporations other than the applicant; and
- **Lateral Spur Charge** – collected from all users who connect to the lateral spur (pipeline).<sup>34</sup>

The design and construction of water and sewer facilities must follow requirements in the County's Public Facilities Manual, a technical manual used to implement Fairfax County's Subdivision and Zoning Ordinances.

#### D. District of Columbia

The District of Columbia Water and Sewer Authority (DC Water) provides water and sewer services for Washington, DC. DC Water also provides wastewater treatment services to over 1.6 million people in Montgomery, Prince George's, Fairfax, and Loudon Counties.<sup>35</sup> DC Water publishes a *Project Design Manual* (PDM) that guides the development, design, and construction of water and sewer infrastructure projects, including those for private developments that will become part of DC Water's infrastructure when complete.<sup>36</sup>

DC Water personnel install water and sewer main connections and taps in new residential, commercial, or industrial developments at a fee to the developer.<sup>37</sup> The developer is responsible for excavation, backfilling, and repaving related to water and sewer connections/taps.<sup>38</sup>

<sup>31</sup> Ibid.

<sup>32</sup> Sewer service areas that are managed by other jurisdictions within Fairfax County include the Town of Herndon, the Town of Vienna, the City of Fairfax, and Fort Belvoir.

<sup>33</sup> Connecting to the Public System, Fairfax County Public Works and Environmental Services, available at <https://www.fairfaxcounty.gov/publicworks/wastewater/connecting-public-system>

<sup>34</sup> Statement of Policy Regarding Sewage Disposal, Fairfax County Department of Public Works, Office of Waste Management, at pp. 6-7, available at <https://www.fairfaxcounty.gov/publicworks/sites/publicworks/files/assets/documents/statement-of-policy-feb2.pdf>; Fairfax County Code § 67.1-10-2.

<sup>35</sup> We Keep the District's Water Flowing, DC Water, available at <https://www.dewater.com/what-we-do>

<sup>36</sup> *Project Design Manual*, DC Water, available at <https://www.dewater.com/design-and-construction-standards>

<sup>37</sup> See Fee Schedule, DC Water, available at <https://www.dewater.com/fee-schedule>

<sup>38</sup> Ibid.



DC Water recently established a System Availability Fee (SAF) that went into effect on June 1, 2018. Like WSSC's System Development Charge, this is a one-time fee for development that requires new or larger water and sewer connections. The fees will "recover the proportionate share of the increased costs associated with the new or larger water and sewer demand place(d) on the District's drinking water and wastewater infrastructure," funding water and wastewater storage, transmission and treatment systems.<sup>39</sup>

The SAF ranges from \$3,944 to \$112,942 for residential and single-family dwellings depending on the SAF meter size.<sup>40</sup> For multi-family and non-residential customers, the SAF ranges from \$4,455 to \$796,654.<sup>41</sup> Developers can receive affordable housing credits for the SAF, depending on the number of new affordable housing units in a project.<sup>42</sup>

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<sup>39</sup> DC Water's System Availability Fee Goes Into Effect Today, DC Water, available at <https://www.dewater.com/whats-going-on/news/dc-water%E2%80%99s-system-availability-fee-goes-effect-today>

<sup>40</sup> District of Columbia Register Vol. 65 – No.20, at p. 2, available at [https://www.dewater.com/sites/default/files/finance/rule\\_making/nofr\\_to\\_amend\\_21\\_dcmr\\_112\\_11\\_system\\_availability\\_fee\\_65\\_dcr\\_5674\\_5\\_18\\_18.pdf](https://www.dewater.com/sites/default/files/finance/rule_making/nofr_to_amend_21_dcmr_112_11_system_availability_fee_65_dcr_5674_5_18_18.pdf). Meter size is determined based on a property's peak water demand.

<sup>41</sup> Ibid.

<sup>42</sup> System Availability Fee FAQs, DC Water, available at [https://www.dewater.com/sites/default/files/permit\\_files/saf-faq.pdf](https://www.dewater.com/sites/default/files/permit_files/saf-faq.pdf)

## Chapter 6. Affordable Housing

This chapter summarizes how Montgomery County and other local jurisdictions require residential developers to help build/fund affordable housing within development projects.

### A. Montgomery County

Montgomery County law requires development applicants that will build 20 or more dwelling units – in a new residential development or in converting an existing property from non-residential to residential use – to also build affordable housing units as part of the development – called moderately priced dwelling units (MPDUs).<sup>1</sup> With some exceptions, County law mandates a minimum of 12.5% of the units in a development be MPDUs.<sup>2</sup>

Several recently enacted bills have amended requirements related to MPDUs. Effective October 31, 2018:

- Developments in County areas where the income of high concentrations of residents exceeds 150% of the County-wide median household income, 15% of units must be MPDUs.<sup>3</sup>
- Developments building between 11 and 19 dwelling units must make a payment to the Housing Initiative Fund of 3% of the sale price of all market rate units in the development.<sup>4</sup>
- Developers of high-rise residential buildings who request permission to build MPDUs at another location must increase the number of MPDUs provided or must increase the number of total bedrooms provided in MPDUs as would have been required for on-site MPDUs.<sup>5</sup>

Developers who agree to build more than the required number of units as MPDUs can use more flexible building standards that allow additional building types and more flexibility in the layout of development projects, or may be exempt development impact taxes.<sup>6</sup> Land in the County in an R-90 Zone<sup>7</sup>, for example, can have up to 4.84 detached houses per acre and each lot must be a minimum of 9,000 ft<sup>2</sup>. Developers who build the minimum required MPDUs can build up to this density. A developer who builds more than the required number of MPDUs, however, can include duplexes and townhouses in a development in addition to detached houses (increasing the total number of units in a development) and can build on smaller lots.<sup>8</sup>

<sup>1</sup> MCC § 25A-5(a).

<sup>2</sup> MCC § 25A-5(d).

<sup>3</sup> MCC § 25A-5(d). Bill 38-17 requires the Planning Board to designate areas where “at least 45 percent of the United States Census Tracts have a median household income of at least 150 percent of the County-wide median household income...” and to update the designations annually.

[https://www.montgomerycountymd.gov/council/resources/files/lims/bill/2017/Signed/pdf/6940\\_1464\\_Signed\\_08032018.pdf](https://www.montgomerycountymd.gov/council/resources/files/lims/bill/2017/Signed/pdf/6940_1464_Signed_08032018.pdf)

<sup>4</sup> MCC §§ 25A-5(b); 25A-5A(b). See Bill 34-17.

[https://www.montgomerycountymd.gov/council/resources/files/lims/bill/2017/Signed/pdf/6939\\_1460\\_Signed\\_08032018.pdf](https://www.montgomerycountymd.gov/council/resources/files/lims/bill/2017/Signed/pdf/6939_1460_Signed_08032018.pdf)

<sup>5</sup> MCC § 25A-5B(a).

<sup>6</sup> MCC § 59-4.4.2(A).

<sup>7</sup> Residential one-family detached zone.

<sup>8</sup> MCC § 59-4.4.8(B), (C).

The next table summarizes the increased density that developers can receive as they increase the percentage of MPDUs in a project.

**Table 6-1. Summary of Allowable Bonus Density for Building Additional MPDUs**

| Density Bonus | MPDUs Required | Density Bonus | MPDUs Required |
|---------------|----------------|---------------|----------------|
| Zero          | 12.5%          | Up to 11%     | 13.6%          |
| Up to 1%      | 12.6%          | Up to 12%     | 13.7%          |
| Up to 2%      | 12.7%          | Up to 13%     | 13.8%          |
| Up to 3%      | 12.8%          | Up to 14%     | 13.9%          |
| Up to 4%      | 12.9%          | Up to 15%     | 14.0%          |
| Up to 5%      | 13.0%          | Up to 16%     | 14.1%          |
| Up to 6%      | 13.1%          | Up to 17%     | 14.2%          |
| Up to 7%      | 13.2%          | Up to 18%     | 14.3%          |
| Up to 8%      | 13.3%          | Up to 19%     | 14.4%          |
| Up to 9%      | 13.4%          | Up to 20%     | 14.5%          |
| Up to 10%     | 13.5%          | Up to 22%     | 15.0%          |

Source: MCC § 25A-5(c)

To receive a building permit, developers required to build MPDUs must enter into a written MPDU agreement approved by both the Director of the Department of Housing and Community Affairs and the County Attorney.<sup>9</sup> The MPDU agreement must include the following:

- The number, dwelling type and location of MPDUs in a development, and
- A construction staging plan requiring that MPDUs be built along with or before market-rate units, that the pace of MCDU construction coincides with the pace of market-rate unit construction, and that the last building constructed not have only MPDUs.<sup>10</sup>

## **B. Prince George's County**

Prince George's County currently does not have an affordable housing requirement for residential development. Past requirements for affordable housing were removed in the mid-1990s.<sup>11</sup> Representatives from Prince George's County Department of Housing and Community Development report that there is not high demand for affordable housing across the County except for in more highly populated areas. In addition, in the County's upcoming Comprehensive Housing Strategy, County staff may recommend developer requirements/contributions for affordable housing in some urban areas.<sup>12</sup>

<sup>9</sup> MCC § 25A-5(b).

<sup>10</sup> MCC § 25A-5(i).

<sup>11</sup> *A Profile of Affordable Housing Programs in Other Washington Area Jurisdictions*; George Mason University, Frederick Polls, and the Center for Housing Policy; July 2014, at p. 30; available at <https://housing.arlingtonva.us/wp-content/uploads/sites/15/2014/07/Housing-Study-WG-Report-Profile-of-Other-Jurisdictions.pdf>

<sup>12</sup> Interview with staff from the County's Department of Housing and Community Development, September 2018.

## C. Fairfax County

With some exceptions, Fairfax County requires new developments with 50 or more dwelling units to include Affordable Dwelling Units (ADU) in the development.<sup>13</sup> ADU requirements do not apply if a development has no density bonus and is one of the following:

- Less than 50 residential units;
- A high-rise;
- One or less residential dwelling units per acre; or
- It is not located in an approved sewer service area.<sup>14</sup>

Fairfax County law allows developers to request a density bonus for providing ADUs, based on the type of dwelling units in the development.<sup>15</sup> The next table summarizes these bonuses.

**Table 6-2. Fairfax County Density Bonuses & Required ADUs**

| Type of Dwelling Unit   | Density Bonus   |
|---|---|
| Single Family Detached  | Up to 20% density bonus; at least 12.5% ADUs  |
| Multiple Family w/o Elevator or w/ Elevator and Under 4 Stories | Up to 10% density bonus; at least 6.5% ADUs<br>Between 10% and 20% density bonus; at least 12.5% ADUs   |
| Multiple Family w/ Elevator and 4+ Stories                      | Up to 17% density bonus; at least 6.25% ADUs<br>If more than 50 percent of required parking for multiple family units is provided – up to 17% density bonus; at least 5% ADUs |

Source: FCZO

Fairfax County's Comprehensive Plan states that development projects in Fairfax County that are not subject to ADU requirements in the Zoning Ordinance may receive a density bonus for voluntarily providing ADUs. Alternatively, developers can achieve a density bonus by providing a monetary or in-kind contribution to the County's Housing Trust Fund or another organization providing affordable housing – in an amount equal to 0.5% of the value of all non-affordable dwelling units in a development.<sup>16</sup>

<sup>13</sup> FCZO § 2-802.

<sup>14</sup> Affordable Housing Fact Sheet, Fairfax County Department of Planning and Zoning, available at <https://www.fairfaxcounty.gov/planning-zoning/sites/planning-zoning/files/assets/documents/compplanamend/trainingcentersite/meetings/03-07-2018/affordable%20housing%20-%20tcstf%20handout.pdf>

<sup>15</sup> FCZO § 2-804.

<sup>16</sup> Fairfax County Comprehensive Plan, Land Use, at p. 29, available at <https://www.fairfaxcounty.gov/planning-zoning/sites/planning-zoning/files/assets/compplan/policy/landuse.pdf>.

#### D. District of Columbia

Many residential development projects in the District of Columbia with ten or more residential units must set aside 8-10% of residential floor area for affordable housing (referred to as the Inclusionary Zoning (IZ) Program).<sup>17</sup> The District of Columbia's Inclusionary Zoning regulations indicate that the purpose of the IZ Program is to expand the amount and distribution of affordable housing in the District by using the skills of private developers – while providing incentives for the development through increased zoning density.<sup>18</sup>

DC regulations exclude certain zones and college or university residential housing, among others, from providing IZ units.<sup>19</sup> The regulations also identify the types and amount of bonus density that developers can receive for building IZ units in a project.<sup>20</sup> Density bonuses differ based on how the land in a development is zoned.<sup>21</sup>

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<sup>17</sup> District of Columbia Municipal Regulations §§ 11-C1001; 11-C1003 [hereinafter “DCMR”]. See also DCC § 6-1041.01 et seq.; <https://dhcd.dc.gov/service/inclusionary-zoning-affordable-housing-program>.

<sup>18</sup> Ibid. § 11-C1000.1.

<sup>19</sup> DCMR § 11-C1001.5.

<sup>20</sup> DCMR § 11-C1002.

<sup>21</sup> Ibid.

## Chapter 7. Caveats

Given the descriptions of the development processes in Montgomery County, Prince George’s County, Fairfax County, and the District of Columbia, the ultimate question arises, “where does it cost more to build?” and “which jurisdiction gets ‘more’ from development projects?” These are questions that this report cannot answer. In several meetings related to this report, staff from the Executive Branch and Planning Department/Planning Board in Montgomery County and from the Executive Branch in Fairfax County stated that it is exceptionally difficult to try to quantify and compare the “cost” of development among local jurisdictions. Development requirements are different. Taxes and tax rates are different. Regulatory requirements and costs are different.

The “cost” of development includes many types of costs, including:

- Fees for professionals such as architects, engineers, and attorneys;
- Development of required studies (e.g., transportation impacts, environmental impacts, etc.);
- Fees for review of development applications, water and sewer applications, and building permits;
- Cost of building of required public infrastructure;
- Impact taxes;
- Financing costs; and
- Building materials and labor.

Along with the above costs, competing and highly variable factors influence the feasibility of any given development project, including:

- Location (within a jurisdiction and in the region);
- Project financing;
- Project timing; and
- Other development projects in an area.

OLO knows of no comprehensive comparison of “the cost” of development among local jurisdictions that examines all relevant factors.

Analyzing the cost of and expected return (profit) from a real estate development project requires expertise in real estate economics. Representatives from the Montgomery County Planning Board observed that the more information the County has about the financing of a specific project, the more leverage the County has when negotiating conditions or amenities related to the project. However, while the Planning Department may be able to analyze some (not all) types of data related to the finances of a project in Montgomery County, Montgomery County staff would not have access to data on projects in other jurisdictions to make comparable comparisons.

Montgomery County representatives from the Executive Branch and from the Planning Department pointed OLO to a 2012 study from the George Mason University Center for Regional Analysis that compared primarily taxes and regulatory costs related to development in Montgomery County and Fairfax County (e.g., development review, permitting, cost of professionals such as architects and engineers).<sup>1</sup> This study concluded at the time that for an individual townhouse or single-family unit –

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<sup>1</sup> See, e.g., *Impact of Local Regulatory Processes and Fees on Ability to Delivery New Housing Units*, George Mason University Center for Regional Analysis, September 2012 [hereinafter “*Regulatory Processes and Fees*”]

the costs analyzed in the study ranged from \$30,000 to \$45,000 in Montgomery County and from \$29,000 to \$66,000 in Fairfax County.<sup>2</sup>

This OLO report focuses on different costs than the 2012 George Mason University study – describing public infrastructure that developers must build or contribute as part of the development process. It does not try to compare the cost among the jurisdictions of providing the infrastructure, nor does it address the costs of the regulatory processes or of environmental requirements related to development (e.g., stormwater management, soil erosion, forest conservation).

Development-related costs can vary significantly among jurisdictions. For example:

- Developers in Fairfax County and Prince George’s County can apply for the rezoning of parcels of land, while, in general, developers in Montgomery County cannot. The rezoning process includes associated costs such as (but not limited to) application fees, costs of studies related to the land, and professional fees for attorneys, architects, civil engineers, traffic engineers, geotechnical engineers, and other consultants.
- The costs associated with environmental requirements can vary significantly based on factors such as the size of the property, whether the property is in a protected area (e.g., connected to the Chesapeake Bay), and the type of development. These costs are very location- and project-specific.<sup>3</sup>

This report highlights the difficulty or danger in trying to make overarching comparisons based on one data point or anecdotal information. For example, one could try to compare the difference between the cost of school development impact taxes in Montgomery County and the recommended per-student proffer contribution in Fairfax County. A quick comparison, without more in-depth analysis, might imply that the cost in Montgomery County could be as much as four times the cost in Fairfax County for the same type of development. This cost, however, is one factor in the full cost of development and cannot be used to form any overarching conclusions.

Similarly, information in the report shows that developers in Fairfax County seeking rezoning of property include proffers of land, money, or effort as a condition of rezoning. Examples highlighted in the report include a developer building a community center or paying for the installation of devices that alter traffic lights for emergency vehicles. Montgomery County does not require developers to provide proffered benefits to the County as a part of the development process.

OLO cautions that the selective use of incomplete data can allow proponents or opponents of individual projects to skew public discussion.

**Given these caveats, readers are cautioned to not draw conclusions from this report on where it “costs” more for developers to build.**

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*Montgomery County*” and “Regulatory Processes and Fees – Fairfax County”]. Found at: [http://cra.gmu.edu/pdfs/Impact\\_of\\_Regulatory\\_Processes\\_Fees\\_on\\_Housing\\_Montgomery.pdf](http://cra.gmu.edu/pdfs/Impact_of_Regulatory_Processes_Fees_on_Housing_Montgomery.pdf) and [http://cra.gmu.edu/pdfs/Impact\\_of\\_Regulatory\\_Processes\\_Fees\\_on\\_Housing\\_Fairfax.pdf](http://cra.gmu.edu/pdfs/Impact_of_Regulatory_Processes_Fees_on_Housing_Fairfax.pdf). This report included analyses of processes in Montgomery County and Fairfax County, published in separate documents. Note that some of the processes and regulatory costs described have changed since the reports were published.

<sup>2</sup> *Regulatory Processes and Fees – Montgomery County*, at p. 21; *Regulatory Processes and Fees – Fairfax County*, at p. 18.

<sup>3</sup> *Ibid.* at p. 5.

## Chapter 8. Discussion Issues

Development projects such as new neighborhood subdivisions and new mixed-use office/residential projects typically bring an increased number of people into the area of the development. Additional people place new demands on public infrastructure such as roads, public schools, recreation options, and demand for public safety services. Historically, state or local governments have been responsible for financing and building new roads, schools, and community centers and for hiring police and firefighters. At some point, governments began to require developers to help finance the cost of public amenities that are strained by new development – as a condition of receiving approval to build.

This Office of Legislative Oversight report responds to the Council’s interest in understanding the types of public infrastructure that developers are required to build or fund in Montgomery County and other local jurisdictions as part of development projects. The report describes the laws, regulations, and policies in Montgomery County related to private development and:

- Development impact taxes;
- Transportation infrastructure;
- Schools;
- Public water and sewer infrastructure; and
- Affordable housing.

It also compares the requirements in Montgomery County to requirements in Prince George’s County, MD, Fairfax County, VA, and the District of Columbia.

Over time, jurisdictions have adopted different approaches to how developers are required to contribute to the cost of public infrastructure. Some jurisdictions require developers to pay money that will be used to build new infrastructure. Some require developers to build some types of infrastructure. And some do both.

And, over time, jurisdictions may alter how developers contribute to the cost of public infrastructure as local needs/priorities change or as jurisdictions try to find “better” ways to allocate costs. In Montgomery County, for example, the most recent Subdivision Staging Policy established Unified Mobility Programs – a mechanism for spreading the cost of building transportation infrastructure among future development in an area – that replace the current process that can lead to some developers paying for a disproportionate amount of infrastructure compared to other developers.

Examining the development processes in Montgomery County and other local jurisdictions provides an opportunity for the Council to talk with stakeholders (e.g., County and agency staff, developers, residents) about existing and potential requirements surrounding private development. The Office of Legislative Oversight recommends that the Council initiate two discussions that may lead to ideas to improve requirements and/or processes.

**Question #1: Would employing (more) staff with expertise in real estate economics to provide analysis during development approval processes be beneficial to Montgomery County?**

**Question #2: Are Montgomery County’s existing laws, policies, and requirements in line with its development priorities and with what the County wants to encourage and discourage for land use?**



## **Chapter 9. Executive Comments**

The Office of Legislative Oversight circulated a final draft of this report to the Chief Administrative Officer for Montgomery County review. OLO appreciates the time taken by County Government representatives to review the draft report and provide comments. OLO's final report incorporates technical corrections provided by County staff. The written comments received from the Chief Administrative Officer are attached in their entirety beginning on the next page.



OFFICE OF THE COUNTY EXECUTIVE


Isiah Leggett  
County Executive

Timothy L. Firestine  
Chief Administrative Officer

MEMORANDUM

November 21, 2018

TO: Chris Cihlar, Director, Office of Legislative Oversight

FROM:  Timothy L. Firestine, Chief Administrative Officer

SUBJECT: CAO Response to OLO Report 2018-11, Draft Report: Exactions Private Development and Public Infrastructure

Thank you for your effort on this report and for the opportunity to review the draft work product. Here are the general and specific comments:

**Overall Comments**

The report does a good job of comparative research of exactions and their purposes between the jurisdictions. As indicated in the report, a conclusion about how the various programs affect the cost of development across jurisdictions cannot be reached based on the analysis conducted and presented. The Office of Legislative Oversight (OLO) should consider expanding the scope of their analysis so that more conclusions could be reached.

For example, the report could analyze in each jurisdiction a theoretical project of typical uses. The analysis could account for a standardized ownership period containing both the development phase and a reasonable period of operations. For example, 10 or 15 years from the initial project application. This analysis would account for the development timeline, unique requirements for utilities, stormwater management, forest conservation, and site development in each, exactions, and ongoing operations and tax payment requirements. The total cost of ownership for a prototypical project would illustrate the order-of-magnitude impact of development approval requirements, including exactions, for each jurisdiction. Ideally, the assessment would also include a review of the predictability of the processes as risk is an important decision criterion for a private developer.

The report would also benefit from explanation of why jurisdictions impose exactions early in the document so that the reader can understand the policy rationale for these.

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requirements. These include, protecting current taxpayers from bearing an unfair burden associated with one-time infrastructure costs required for new development. The exactions allow for a more reliable and stable budgeting process since revenues required to provide infrastructure and delivered coincident, in theory, with the new land use. Exactions also benefit property owners seeking development or redevelopment. Without these one-time resources, local government may not have sufficient capacity to provide the necessary infrastructure. Without a clear mechanism to deliver this infrastructure the land owner may be delayed or may need to deliver a disproportionate amount of infrastructure in order to proceed with their development plans.

### **Specific Comments**

- In the Introduction, there is reference to stormwater management and forest preservation adding significant costs to projects and providing benefits to the community at large. There is a concern that this mischaracterizes the intent of these requirements. Both requirements are intended to protect environmental resources that might otherwise be harmed by development, rather than to create new benefits for the public. The costs described are those necessary to avoid damage, not those required by law or regulation to provide benefits.
- On page two, the report would benefit from a description of how the Planning Board and Council approve master plans, sector plans, and other similar plans that call for future public facilities. Many view these plans as a commitment to provide these facilities by the County. The County does not, however, make a financial commitment to provide these facilities based on adoption of the plan. This often leads to a substantial disconnect between community expectations and the ability of the County to deliver these facilities on the expected timelines within its constrained financial resources.
- On page three, the statement in the first paragraph that the plans have the “force of law” should be expanded. What specific conditions cause the plan to have the “force of law”? Are there examples that can be provided? In most cases, the Planning Board’s development review standard is that a proposal be “in substantial conformance with the Master Plan.” Also, on page three, the second paragraph should more clearly explain whether and how the County Council is required to approve a plan for it to be adopted. Finally, the maps are also hard to read at their current scale.
- On page seven, the report references “reservations”. The discussion of reservations should include a description of the limited terms that are usually in place with these and the offsetting tax benefits to the property owners. Additionally, this discussion should indicate that property in reservations must still be acquired by the County for the intended public use. Furthermore, the reservations are sometimes too short for the County to develop a project and program funds for use of the property. Additionally, and in some cases, when a developer provides land to the County for public use and loses the density

associated with that property, the value of the land is credited to the developer against their impact tax liability, such that the County is paying for the land through the impact tax credits provided.

- On page eight, it would be useful to state that DPS verifies the Planning Board's findings regarding adequate public facilities before issuing any permits on behalf of the Executive.
- On page 20, there is a single reference to impact tax exemptions for affordable housing projects. The report should explore the use of this exemption and the public benefits received in more detail. This is a very important provision of the impact tax law.
- On page 28, the statement attributed to DOT representatives should be revised. The LATR guidelines developed by the Planning Department outline the Planning Board's stated preference for transportation mitigation to be considered during project reviews. DOT supports this policy and participates in the reviews of these projects through the Development Review Committee. DOT does not have a unique policy that formally expresses a preference for the type of mitigation provided.
- On page 29, it would be useful to clarify that the UMP payments are in addition to impact taxes and are a tool for compliance with adequate public facilities requirements for a localized area (i.e.. LATR). It would also be useful to acknowledge that these fees are escalated biannually based on the construction cost index and reassessed every six years.

Thank you for your work on this report. If you have further questions, please contact Fariba Kassiri, Assistant Chief Administrative Officer, at (240) 777-2512 or [Fariba.Kassiri@montgomerycountymd.gov](mailto:Fariba.Kassiri@montgomerycountymd.gov).

TLF:cc

cc: Fariba Kassiri, Assistant Chief Administrative Officer  
Al Roshdieh, Director, Department of Transportation  
Diane Jones, Director, Department of Permitting Services  
Patty Bubar, Director, Department of Environmental Protection  
Alex Espinosa, Director, Department of Finance  
Jennifer Hughes, Director, Office of Management and Budget  
Christopher Conklin, Deputy Director, Department of Transportation